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305 - 30158

B. S. PEARSALL BUTTER COMPANY,
Appellant,

vs.

THEODORE RENZ & SONS COMPANY,
Appellee.

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APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 599

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action by the B. S. Pearsall Butter Company, the plaintiff, against the Theodore Renz & Sons Company, the defendant, to recover the value of 18 milk cans which it is alleged by the plaintiff were retained by the defendant.

A set-off was filed by the defendant in which it was alleged that the plaintiff was indebted to the defendant in the sum of \$162.50 for the value of 5000 gallons of milk which was not fit for use.

The case was tried before the court without a jury. The court found in favor of the plaintiff in the sum of \$68 and in favor of the defendant in the sum of \$97.80, and entered judgment in favor of the defendant in the sum of \$9.50.

The plaintiff has prosecuted the present appeal from the judgment.

The defendant has filed no briefs.

The evidence shows that the defendant had purchased milk from the plaintiff, which was delivered to the defendant in ten-gallon cans, from March 1, 1924, to July 29, 1924; that on the latter date the plaintiff drew a draft on the defendant for the entire amount due to the plaintiff up to that time; that the draft was paid by the defendant and no complaint was made by the defendant about the milk at that time.

JAN 16 1960

308 - 30122

APPEAL FROM NORTHERN DISTRICT COURT

OF CHICAGO

2411 A. 599

E. S. FARMER, NORTHERN DISTRICT COURT
Appellant

THOMAS HUNT & SONS COMPANY
Appellee

MR. JUSTICE JENNINGS DELIVERED THE OPINION OF THE COURT.

This is an action by the E. S. Farmer, Northern District Court,

the plaintiff, against the Thomas Hunt & Sons Company, the defendant, to recover the value of 18 milk cans which it is alleged by the plaintiff were retained by the defendant.

A writ was filed by the defendant in which it was

alleged that the plaintiff was indebted to the defendant in the sum of \$162.50 for the value of 5000 gallons of milk which was not fit for use.

The case was tried before the court without a jury. The court found in favor of the plaintiff in the sum of \$88 and in favor of the defendant in the sum of \$27.50, and entered judgment in favor of the defendant in the sum of \$27.50.

The plaintiff has presented the present appeal from

the judgment.

The defendant has filed no petition.

The evidence shows that the defendant had purchased milk from the plaintiff, which was delivered to the defendant in ten-gallon cans, from March 1, 1934, to July 30, 1934; that on the latter date the plaintiff drew a draft on the defendant for the entire amount due to the plaintiff up to that time; that the draft was paid by the defendant and no complaint was made by the defendant about the milk at that time.

W. E. Renz, on behalf of the defendant, admitted on cross examination that the plaintiff told him before the defendant started to buy milk from the plaintiff, that at any time the defendant received skim milk that was not satisfactory and called the attention of the plaintiff to that fact, the plaintiff would replace it; and that the defendant never asked the plaintiff to replace the skim milk that was delivered.

C. F. Crowe, an employee of the plaintiff, testified that he "notified Mr. Renz the next day that we investigated the milk," and that he, Crowe, said, "Do you want to return it? Our truck is there and you can return it and we will give you credit;" that Renz said, "No, I can use it in other sources, or other ways."

The evidence shows that sixteen cans were retained by the defendant.

We are of the opinion that the judgment of the trial court should be reversed and that judgment should be entered here on the finding of the court in favor of the plaintiff in the sum of \$38.

JUDGMENT REVERSED AND JUDGMENT
ENTERED HERE IN FAVOR OF THE
PLAINTIFF FOR \$38.00.

Matchett, P. J., and McSurely, J., concur.

W. E. Ross, on behalf of the defendant, admitted on cross examination that the plaintiff told him before the hearing and started to buy milk from the plaintiff. That at any time the defendant received him with that was not satisfactory and called the attention of the plaintiff to that fact, the plaintiff would replace it; and that the defendant never asked the plaintiff to replace the milk that was delivered.

C. V. Grows, an employee of the plaintiff, testified that he "noticed Mr. Ross the next day that we investigated the milk," and that he, Grows, said, "Do you want to return it? Our truck is there and you can return it and we will give you credit," that Ross said, "No, I want it in other business, or other ways." The evidence shows that sixteen eggs were returned by the defendant.

We are of the opinion that the judgment of the trial court should be reversed and that judgment should be entered here on the finding of the court in favor of the plaintiff in the sum of \$28.00.

JUDGMENT REVERSED AND JUDGMENT
ENTERED HERE IN FAVOR OF THE
PLAINTIFF FOR \$28.00.

Matchett, H. L., and McGowan, E., concur.

317 - 30170

ALBERT A. SCHWARTZ,
Appellee,

vs.

RELTIG BUILDING CORPORATION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

50722
241 I.A. 599

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Albert A. Schwartz, the plaintiff, against the Reltig Building Corporation, the defendant, to recover \$154.84 alleged to have been paid under protest by the plaintiff to the defendant for the rental of an apartment by the plaintiff in the Southmoor Hotel, which was owned and operated by the defendant.

The court entered judgment on the verdict; and the defendant prosecuted the present appeal from the judgment.

The principal question in the case is a disputed question of fact, namely, whether the plaintiff rented the apartment by a special agreement which, as alleged in the statement of claim, was to the effect that the charge or rental "would be calculated and based upon the rate of \$240 a month for such number of months, weeks, or days, as the plaintiff found it necessary, or desired to occupy the said premises."

On this question the evidence is conflicting.

The plaintiff testified that about September 10, 1924, he went to the Southmoor hotel to engage an apartment; that the clerk at the desk directed George Moore, an employee of the hotel, to show him, the plaintiff, some apartments; that he, the plaintiff, selected an apartment and asked Moore how much the rental would be; that Moore said it would be \$225 a month; that he, the

241 A 333

IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED

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ORIGINAL AS THE SAME WAS FILED IN THE OFFICE OF THE

CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE

SOUTHERN DISTRICT OF NEW YORK, ON THE 10TH DAY OF

DECEMBER, 1933, AT NEW YORK, NEW YORK.

IN WITNESS WHEREOF, I have hereunto set my hand and

the seal of the said Court, at New York, New York,

this 10th day of December, 1933.

CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE

SOUTHERN DISTRICT OF NEW YORK.

BY _____, Deputy Clerk.

ATTEST: _____, Secretary.

IN WITNESS WHEREOF, I have hereunto set my hand and

the seal of the said Court, at New York, New York,

this 10th day of December, 1933.

CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE

SOUTHERN DISTRICT OF NEW YORK.

BY _____, Deputy Clerk.

ATTEST: _____, Secretary.

IN WITNESS WHEREOF, I have hereunto set my hand and

the seal of the said Court, at New York, New York,

plaintiff, stated that he was not interested in a monthly rate; that he did not know how long he would stay at the hotel for the reason that he was building a home and did not know the day he could move into his new home; that he did not know just the date it would be finished or completed; that Moore said, "If you want this apartment for any shorter period on a day rate, it would be \$15 additional, it would cost \$240 per month;" that he, the plaintiff, agreed to this and asked Moore to make out an agreement to that effect; that Moore said, "Why, that was not necessary at all;" that "all that was on a monthly basis;" that if it was on a monthly basis the plaintiff would have to sign a lease; that he, the plaintiff, and his wife stayed at the hotel from about November 10, 1924, to December 12, 1924; that he moved from the hotel to his new home.

Anna Goodman testified on behalf of the plaintiff that she accompanied the plaintiff when he went to the hotel to rent an apartment; that the plaintiff told Moore that he wanted an apartment for no particular length of time; that Moore said that the rent would be \$225 if the apartment was taken for any length of time, but that as the plaintiff was to have the privilege of moving out at any time the rent would be at the rate of \$240; that this arrangement seemed to be satisfactory to all parties concerned.

Moore testified on behalf of the plaintiff that he told the plaintiff that the apartment the plaintiff had selected would cost \$225 a month if he took a long lease; that the plaintiff told him that he did not want to rent the apartment by the month; that he wanted an apartment only temporarily until his home was finished; that the plaintiff said it might be a month or two months or it might be longer; that he, Moore, then made him another price on the apartment of \$240 a month, "with an option" until his home was ready; that he, the plaintiff, could go when his house was

ready to occupy; that the arrangement with the plaintiff was that he had the right to remove from the hotel when his home was completed, upon the payment to the hotel of the money due the hotel when he moved.

Anna Schwartz, the wife of the plaintiff, testified that she and her husband decided to move on December 11, 1924; that she had been over to her house the day before and found that she could move in the following day; that she decided to send a few trunks over to the house on December 11; that she was going to stay at her house that night and wanted the things to go there; that after the trunks were taken down in the elevator some man in the office called up and said, "I want let any things go out until you pay the bill;" that she said, "We are not going until tomorrow;" that he said, "You have got to pay the bill first;" that she said, "All right, make out a statement and I will pay it;" that she went to the office and they kept her waiting for half an hour while they made the statement; that in the meantime the movers were waiting to take the things down and she was getting worried and nervous; that she paid the bill; that when "the girl" took the money and went to make change, it "dawned upon her" that she had given the girl too much money; that she said to the girl, "I handed you too much money;" that the girl smiled and said, "That is your hard luck;" that she said to the girl, "What do you mean, 'hard luck,' you see this money does not belong to you;" that the girl said, "I can't do anything for you, see the manager;" that a man in the office said, "You will have to see Mr. Gittler" (Isaac Gittler, the president of the defendant corporation); that Gittler said, "I can't return your money;" that she said, "You realize it is a mistake. The money does not belong to you. We rented the apartment with the understanding we paid \$15 a month extra, with the privilege of getting--

out whenever we wanted to;" that she offered to pay for the eleven days of the month of December.

On behalf of the defendant Charles Henry, an employee of the hotel, testified that apartments such as the one the plaintiff rented were never rented by the hotel by the day but only on a six months' lease; that he sent the plaintiff a lease to sign, but that he does not know whether the plaintiff signed the lease.

Isaac Gittler, president of the defendant corporation, testified that Moore came to him and said that he had two tenants for the apartment; that they wanted it from month to month; that he told Moore that if they would use their own kitchen equipment the rent would be \$240 a month; that the kitchen equipment cannot be used any more after a tenant leaves; that on December 11, Mrs. Schwartz called at his office; that she started to cry and said, "My husband called me up about paying too much money;" that he, Gittler, said, "I will see;" that he spoke to the cashier and that the cashier said, "She paid her bill and then said nothing further and now she comes and wants her money;" that he, Gittler, said to Mrs. Schwartz, "You paid for a month's rent;" that she said, "I am moving out;" that he said, "You can move out, but I gave you a monthly rental and you have to pay for the month in advance, that is the only condition I have for it."

The defendant showed by its books that the plaintiff had paid the rent in advance while he and his wife occupied the apartment.

The plaintiff testified that the reason he paid the rent in advance was because he could see in October that his house would not be ready before the end of the month; that in November he paid half of the rent in advance and about the middle of the month paid the other half; that he knew the house would not be ready in

and whenever we wanted to, but she refused to pay for the eleven

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November; that he did not pay the rent in December until he moved out; that he told the clerk on December 2nd or 3rd that he would not pay until the day he moved.

Counsel for the defendant contend that the evidence on behalf of the plaintiff in regard to the rental agreement rests on the testimony of the plaintiff alone; that he was not corroborated; that he was directly contradicted by Gittler; and that in such state of the record the evidence is not sufficient.

We do not agree with counsel for the defendant. We think that the substance of the plaintiff's testimony was corroborated by both Anna Goodman and George Moore. Furthermore, in the evidence on behalf of the defendant there is a significant circumstance which tends to corroborate the plaintiff, and that is that there is no evidence that the plaintiff ever signed a lease. Yet, as we have stated, Henry testified that apartments such as the one occupied by the plaintiff were rented only on a six months lease. It will be observed further from Henry's testimony that he sent the plaintiff a lease but that he did not know whether the plaintiff signed the lease.

There is a circumstance, although a slight one, in the testimony of Gittler which tends to show that the plaintiff believed that he was not renting the apartment on a regular monthly basis. Gittler testified, as we have stated, that on December 11, when Mrs. Schwartz came to him complaining about the overpayment she had made to the cashier, Mrs. Schwartz said, "My husband called me up about paying too much money."

Counsel for the defendant contend that Moore did not have authority to make an agreement of the kind testified to by the plaintiff. On this question the evidence is conflicting.

Moore testified that he was hired to rent rooms and

Bureau and Illinois Department of State will send you all the necessary information
 groups and have both the local government and private industry and state and
 federal government.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 19th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the development of a new way of life. This new way of life is based on the use of modern technology and the division of labor. It is a way of life that is different from the way of life that existed in rural areas. The process of urbanization has also led to the development of a new social structure. This new social structure is based on the relationship between the individual and the community. It is a social structure that is different from the social structure that existed in rural areas. The process of urbanization has also led to the development of a new culture. This new culture is based on the values and beliefs of the urban population. It is a culture that is different from the culture that existed in rural areas. The process of urbanization has also led to the development of a new economy. This new economy is based on the production and distribution of goods and services. It is an economy that is different from the economy that existed in rural areas. The process of urbanization has also led to the development of a new political system. This new political system is based on the relationship between the individual and the state. It is a political system that is different from the political system that existed in rural areas. The process of urbanization has also led to the development of a new way of thinking. This new way of thinking is based on the use of logic and reason. It is a way of thinking that is different from the way of thinking that existed in rural areas. The process of urbanization has also led to the development of a new way of life. This new way of life is based on the use of modern technology and the division of labor. It is a way of life that is different from the way of life that existed in rural areas. The process of urbanization has also led to the development of a new social structure. This new social structure is based on the relationship between the individual and the community. It is a social structure that is different from the social structure that existed in rural areas. The process of urbanization has also led to the development of a new culture. This new culture is based on the values and beliefs of the urban population. It is a culture that is different from the culture that existed in rural areas. The process of urbanization has also led to the development of a new economy. This new economy is based on the production and distribution of goods and services. It is an economy that is different from the economy that existed in rural areas. The process of urbanization has also led to the development of a new political system. This new political system is based on the relationship between the individual and the state. It is a political system that is different from the political system that existed in rural areas. The process of urbanization has also led to the development of a new way of thinking. This new way of thinking is based on the use of logic and reason. It is a way of thinking that is different from the way of thinking that existed in rural areas.

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that he did not have to get the consent of the manager of the hotel or Gittler before he could make final arrangements; that Gittler's orders were to rent the apartments; that the hotel was a new one and that Gittler's instructions were to fill the house; that there was a standard price for the apartments, but that he, Moore, could reduce it 10 per cent but not more than 15 per cent; that when he rented the apartment to the plaintiff he went to see Mrs. Bachner (manager of the hotel at the time) to get her final O. K. on the arrangement, and she O. K'd it; that he went to see Mrs. Bachner because more than the standard price was being charged for the apartment.

Gittler testified that Moore's instructions were to show the apartments and to tell the prices, and not to reduce the prices or make special arrangements without coming to see him, or the manager; that he discharged Moore.

We are of the opinion that there is sufficient evidence to justify the jury in finding that Moore had authority to make an agreement with the plaintiff in regard to the rental of the apartment.

Counsel for the defendant further contend that the trial court committed reversible error in allowing the trial attorney for the plaintiff to ask leading questions on the examination of the witnesses for the plaintiff.

We do not think that the court erred. According to the well established rule, a trial court has a large discretion in the matter of the examination of witnesses, and we do not think that the court abused its discretion in the case at bar.

Counsel for the defendant further contend that on the examination of Moore by the plaintiff's attorney, the court erred in overruling the objections of the attorney for the defendant to

the following question and answer:

"Q. Do you know of any arrangement made with Mr. Schwartz whereby he had the right to remove from the Southmoor Hotel when his building was completed upon the payment to the hotel of the money due the hotel when he removed from these premises?

A. That is the understanding, the privilege."

Counsel for the defendant maintain that the question and answer both involve conclusions. That may be true, but before the question was asked the witness had already testified to facts from which the conclusion in the answer to the question reasonably could be inferred.

In the case of Illinois Southern Ry. Company v. Hamill, 226 Ill., 38, in speaking of a similar objection the court said (pp. 93, 94): "It is next assigned as error that the court erred in permitting Kingsley to state, when upon the stand as a witness, that he considered that he was in a perilous situation at the time he whipped up his horses and the appellee attempted to get out of the wagon after they discovered the approaching train, as it is said the question called only for the conclusion of the witness. It, perhaps, may be true that the statement of the witness that he considered that he was in a dangerous situation was, in a sense, the conclusion of the witness. He had, however, before the question was asked, stated to the jury all the facts in his knowledge surrounding the accident, and if it were conceded, the question was objectionable as calling for the conclusion of the witness, we think the answer worked no harm to appellant and should not be held to constitute reversible error."

Counsel for the defendant further contend that there are two fatal variances between the allegations in the statement of

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claim and the proof. First, that "the evidence conclusively shows" that the payment of the rent to the hotel by Mrs. Schwartz, "if paid under circumstances entitling plaintiff to recover, was paid by mistake," and was not made under protest; and that the plaintiff's statement of claim alleges that the payment was made under protest. Second, that the evidence shows that the regular or standard rental of the apartment was \$225 a month, and that the extra charge was \$15 a month; and that the statement of claim alleges that the rental was \$240 a month, and the extra charge was \$10 a month.

The defendant is not entitled to present the question of variance for review, as the alleged variances were not specifically pointed out as the evidence was introduced on the trial; and no motion was made by the defendant at the close of all of the evidence to exclude the evidence on the specific ground that there were variances. Libby, McNeil & Libby v. Scherman, 146 Ill., 540, 549; Garney v. Marquette Coal Mining Company, 260 Ill., 280, 285; Thomas v. Chicago Embossing Company, 307 Ill., 134, 138, 139.

We are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurnely, J., concur.

366 - 30219

HARRY F. HARVEY,
Appellee,

vs.

E. C. TARADASH,
Appellant.

APPEAL FROM MUNICIPAL COURT OF
CHICAGO.

241 I.A. 599

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by E. C. Taradash, the defendant, from an order of the Municipal court of Chicago, denying the motion of the defendant to vacate and set aside a judgment of confession in the amount of \$560 in favor of Harry F. Harvey, the plaintiff, in an action for rent alleged to be due to the plaintiff from the defendant on a lease of certain premises in the city of Chicago.

In support of the motion to vacate the judgment the defendant filed an affidavit averring that he had a good and meritorious defense upon the merits to the whole of the plaintiff's demand.

The only question to be determined is whether the affidavit is sufficient. The affidavit alleges that the defendant was the lessee, but that the Hyland Electrical Supply Company was the tenant in fact with the knowledge and consent of the plaintiff; that the leased premises consisted of the first floor and the basement of a four-story building; that the premises were leased to the defendant, but that with the knowledge and consent of the plaintiff they were used as an office and stockroom by the Hyland Electrical Supply Company; that the other three stories of the building were occupied by the Franklin Hotel. The affidavit further alleges as follows:

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"Affiant further states that the lease upon which judgment herein was confessed is a lease between one Harry F. Harvey as lessor and this affiant as lessee, whereby said Harvey demised and leased to this affiant the store and basement at No. 31 North Franklin street, Chicago, Illinois, to be used for office and stockroom for electrical supplies, for the period commencing January 2, 1929, and ending December 31, 1934, at a term rental of \$10,800.00, payable in sixty installments of \$180.00 each; that said lease provided that this affiant as lessee has the privilege of assigning said lease to a corporation hereafter to be formed; that affiant took possession of said premises under said lease and that after taking possession thereof, affiant caused to be formed and organized under the laws of the State of Illinois, a corporation known as Hyland Electrical Supply Co., and that said Hyland Electrical Supply Co., after the day of its formation and organization continued to occupy said premises until the date hereinafter set forth; that during all the time that said corporation was in possession of said premises and until the date hereinafter set forth, it paid rent to said plaintiff in pursuance of the terms of said lease; that said plaintiff knew that said corporation and not this affiant individually was in possession of said premises since on or about the 2nd day of January, 1929; that plaintiff regarded said Hyland Electrical Supply Co. as the tenant of said premises, as in fact it was. *** Affiant further states that during the term of said lease and during the time when said Hyland Electrical Supply Co. was in possession of said store and basement, it came to the attention of this affiant and other persons interested in and connected with said Hyland Electrical Supply Co., as employees, officers or otherwise, that the said Franklin Hotel was a house of assignation or of ill fame and was used and maintained and operated by the tenant or lessee thereof for immoral and lewd purposes; that said hotel was fre-

quented at all hours of the day and night by loose and drunken characters and by persons of loose morals, who visited and frequented the same for the purpose of carrying on their lewd and immoral relations; that men and women intent upon the exercise of immoral relations visited said hotel openly and habitually for the purpose of carrying on the relations aforesaid. Affiant further states that he and other persons interested in and connected with said Hyland Electrical Supply Co. frequently called the attention of the plaintiff to the conditions aforesaid concerning the operation of said Franklin Hotel; that the plaintiff took no action of any kind to abate the nuisance upon said premises by the operation of said hotel in the illegal and immoral manner aforesaid, but the conditions hereinbefore described continued to exist in spite of the repeated and insistent complaints of this affiant and of said Hyland Electrical Supply Co. made to said plaintiff. Affiant further states that on at least one occasion said Franklin Hotel was raided by police officers of the city of Chicago and that complaint by said Hyland Electrical Supply Co. of the character of said hotel was made to the police authorities of the city of Chicago after the plaintiff, the having knowledge of the situation and of the uses and purposes to which said hotel was being put, failed to take any action with respect thereto. Affiant further states that in its business aforesaid the corporation employed a number of persons, some of whom were women and girls; that on account of the conditions in connection with the operation of said hotel, many of said women and girl employees refusing to submit to said conditions, refused to longer continue their employment with said Hyland Electrical Supply Co., and quit the employ of said corporation, thus causing said corporation a great amount of annoyance and uncertainty in the management and operation

of its business; that the proper management and operation of said business were interrupted and impaired and materially interfered with by the frequent change of employees necessitated and caused by the maintenance of the conditions hereinbefore described, in connection with said hotel. Affiant further states that the entrance to said hotel immediately adjoins on the south the store leased to this affiant and occupied as aforesaid by said Hyland Electrical Supply Co.; that persons entering said hotel for the immoral and illegal purposes hereinbefore described in many instances and commonly passed the place of business of said Hyland Electrical Supply Co., and said persons could be seen by and the character of their mission became apparent to the employees of said Hyland Electrical Supply Co.; that on occasions it became necessary for the said Hyland Electrical Supply Co. to require certain of its woman and girl employees to work in the evening and at night; that in the evening and at night the conditions attendant upon the operation of said hotel hereinbefore described became more aggravated, so that upon many occasions said women and girl employees refused to work at said Hyland Electrical Supply Co.'s place of business at night, and thus the business of said Hyland Electrical Supply Co. was interfered with, impaired, and damaged, all on account of the immoral and illegal purposes for which said hotel was permitted to be maintained and operated. Affiant further states that his attention and the attention of said Hyland Electrical Supply Co. were on many occasions called to the injurious effects of the operation of said hotel in the manner aforesaid and upon its business by customers and prospective customers of said Hyland Electrical Supply Co., who complained to this affiant and to said Hyland Electrical Supply Co. of the character of said hotel, and that this affiant verily believes

that such business which otherwise would have inured to said Hyland Electrical Supply Co. was lost to said corporation by reason of the location of the business of said corporation in the building aforesaid under the conditions aforesaid. Affiant further states that it became the duty of the plaintiff, after having knowledge or after being charged with knowledge of the conditions aforesaid relating to that part of the plaintiff's building which was occupied by said hotel, to abate such immoral and illegal use or to cause the same to be abated, but the plaintiff disregarding his duty utterly failed to abate the nuisance caused by the operation of said hotel in the manner aforesaid, so that the conditions complained of did not improve but continued as before; that said Hyland Electrical Supply Co., of which this affiant is a chief stockholder and of which he is also an officer and director, after making the repeated and insistent complaints aforesaid, and after said complaints were ignored by the plaintiff as aforesaid, and after it became apparent that the conditions with reference to the operation of said hotel would not be removed or abated by the plaintiff, vacated said premises on or about the 30th day of April, 1924. * Affiant further states that the facts and circumstances heretofore set forth with reference to the use of the plaintiff's premises by said Franklin Hotel constituted a constructive eviction of said Hyland Electrical Supply Co. from its premises aforesaid, and that neither this affiant nor said Hyland Electrical Supply Co. is liable to the plaintiff for any rent accruing after April 30, 1924, and that neither of them is liable for the rent for the months of May, June and July, 1924, and that the judgment aforesaid should be vacated and set aside and this affiant should be permitted to enter his appearance and to file an affidavit of merits herein."

The affidavit alleged that during the entire time of the occupancy of the premises by the Hyland Electrical Supply Company the rent was paid to the plaintiff.

We are of the opinion that the affidavit is insufficient.

We think that the affidavit alleges facts which constitute a constructive eviction. Allatt v. Hovars, 168 Ill. App., 573, 574; Hartenhauer v. Branstagsh, 320 Ill. App., 326, 329, 330; 36 Corpus Juris, p. 266. But we think that the affidavit fails to show that the Hyland Electrical Supply Company in the circumstances had not waived its right to abandon the premises.

The rule is well established that if a tenant retains possession of the premises after a constructive eviction, he waives his right of abandonment; that no constructive eviction exists without a surrender of possession. Barrett v. Raddie, 158 Ill. 479, 484; Leiferman v. Caten, 147 Ill., 93, 101; Hill v. Terra Haute Growing Company, 303 Ill. App., 171, 175.

As stated in 36 Corpus Juris, pp. 256, 259, "to constitute an eviction the tenant either must be dispossessed or he must abandon the premises because of the landlord's acts or omissions. There is no eviction if he continues in possession, however much he may be disturbed in the beneficial use and enjoyment of the premises. So in order to constitute an eviction it is necessary that there be some affirmative act or default by the landlord. If the tenant abandons the premises there is no eviction, although it is otherwise where expulsion is inevitable, and the tenant therefore voluntarily surrenders possession."

It is also the rule, as announced in the case of Vintakero v. Pappas, 310 Ill., 115, 117, that where there is a continuing cause of forfeiture, for a breach of covenant under a

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...il est, dans le monde, un homme qui se souvient de son pays.

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lease by the lessee, the acceptance of rent after the breach incurring the forfeiture was committed, will not preclude the lessor from insisting upon the forfeiture if the breach continues after the acceptance of rent. The principle announced in the case of Vinabero v. Pappas, supra, undoubtedly would apply to the payment of rent by the lessee, where there was a continuing cause of forfeiture for a breach of covenant under a lease, by the lessor.

In the case at bar, although the affidavit shows that the eviction was a continuing eviction, the affidavit also shows that the Hyland Electrical Supply Company remained in the premises for four years and four months. This situation, according to the authorities we have cited, raises the question whether the Hyland Electrical Supply Company waived its right to abandon the premises by remaining in the premises. There are, however, no definite allegations in the affidavit from which this question can be determined. The affidavit does not allege specifically the time when either the plaintiff or the Hyland Electrical Supply Company first knew that the hotel was being used for immoral purposes; nor does the affidavit specifically allege the time or times when the Hyland Electrical Supply Company notified the plaintiff that the hotel was being used for immoral purposes; nor does the affidavit specifically allege the time or times when the Hyland Electrical Supply Company paid the rent to the plaintiff. In these respects the affidavit merely alleges that "during the term" of the lease the Hyland Electrical Supply Company learned of the immoral purposes for which the hotel was being used; that the Hyland Electrical Supply Company "frequently called the attention of the plaintiff" to the objectionable conditions, and "made repeated and insistent complaints;" that "during all of the time" that the Hyland Electrical Supply Company was in possession of the premises, it paid rent to the plaintiff. Since the eviction was a continuing

[illegible]

eviction, by paying the rent and remaining in the premises, the Hyland Electrical Supply Company did not waive the right to abandon the premises subsequently to the payment of the rent, if the condition constituting the eviction continued after the payment of the rent, but did waive the right to abandon the premises on account of the condition existing prior to the payment of the rent. (Vintaborg v. Pagnas, supra.) It is obvious, therefore, that in order to show that the Hyland Electrical Supply Company had the right to abandon the premises at the time that the affidavit alleges that the Hyland Electrical Supply Company actually vacated the premises, the affidavit should show that on a specific date prior to the vacating of the premises, the objectionable condition still existed. In respect of the vacating of the premises the allegations of the affidavit are as follows: "after making the repeated and insistent complaints aforesaid, and after said complaints were ignored by the plaintiff as aforesaid, and after it became apparent that the conditions with reference to the operation of said hotel would not be removed or abated by the plaintiff, vacated said premises on or about the 30th day of April, 1924. *** Affiant further states that the facts and circumstances hereinbefore set forth with reference to the use of the plaintiff's premises by said Franklin Hotel constituted a constructive eviction of said Hyland Electrical Supply Co. from its premises aforesaid, and that neither this affiant nor said Hyland Electrical Supply Co. is liable to the plaintiff for any rent accruing after April 30, 1924, and that neither of them is liable for the rent for the months of May, June and July, 1924, and that the judgment aforesaid should be vacated and set aside and this affiant should be permitted to enter his appearance and to file an affidavit of merits herein."

It will be observed from the allegations of the affidavit just above quoted that no specific date is alleged; and that there is not even an explicit allegation that the objectionable conditions still existed at the time that the Hyland Electrical Supply Company vacated the premises. For all that appears from the affidavit, the Hyland Electrical Supply Company may have waived its right to abandon the premises. But it is essential that in order to establish a valid defense to the action of the plaintiff, the affidavit should show affirmatively that the Hyland Electrical Supply Company had the right to abandon the premises.

For the reasons stated the order of the trial court is affirmed.

APPENDIX.

Hatchett, P. J., and McSurely, J., concur.

G. F. HEATH, G. HEATH, A. D. HEATH,
A. BURNS, M. EVANS, L. C. HEATH,
A. Wm. PARQUARR, W. A. BURNS, E. W.
RICHARDSON, A. J. RICHARDSON, B. W.
FOULGER, H. HUNT, W. J. N. BRODRICK,
J. E. CAZENOVE, L. E. CHRISTIE, F. B.
MESSENGER, L. A. BURN, S. H. RICHARDSON,
A. J. L. CIRCHITT, Trading as LLOYD'S,
Appellants,

241 I.A. 599

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

vs.

PAUL HORN,

Appellee.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by C. E. Heath et al., trading as Lloyd's, the plaintiffs, from a judgment in the Municipal court of Chicago in favor of Paul Horn, the defendant, in an action brought by the plaintiffs against Horn to recover damages for the loss of a mink fur coat, the property of Anna Rosen, who was insured against loss by the plaintiffs. Anna Rosen assigned her claim against the defendant to the plaintiffs.

The case was tried before the court without a jury.

The only question to be determined is whether the defendant was a bailee.

The defendant contends that "he was not in any way a bailee and not liable as a bailee and the law of bailment does not apply."

The contention of the plaintiff is that the defendant was a bailor, and that the loss of the coat was due to his negligence.

The evidence relating to the question of bailment is as follows: Anna Rosen testified on behalf of the plaintiffs that she gave the coat to the defendant to store for her; that she gave the defendant no instructions in regard to the coat; that the de-

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JANUARY 10 1900

ALL OFFICIALS AND EMPLOYEES OF THE STATE

THIS IS TO CERTIFY THAT THE FOLLOWING IS THE

RECORD OF THE OFFICE OF THE SECRETARY OF THE STATE

FOR THE YEAR 1900

AS KEPT BY THE SECRETARY OF THE STATE

FOR THE YEAR 1900

RECORDED IN THE OFFICE OF THE SECRETARY OF THE STATE

FOR THE YEAR 1900

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defendant told her that he had rented part of the vault of a furrier named Jack Glasser; that the defendant told her that as he had a part of Glasser's vault, the storage would not be as high as if he put the coat in storage himself; that the price of the storage was fixed by the value of the coat; that the value of the coat was put at a low figure, about \$400, and that the price of storage was estimated on that basis; that the defendant notified Anna Rosen that the coat was gone; that the defendant did not say how the coat was lost.

Jack Glasser testified that he had a storage vault and that he stored goods for others; that he rented a little space in the vault to the defendant; that he charged the defendant seven dollars on each garment for storage and cleaning; that the defendant had two racks in the vault which were used exclusively by the defendant for the storage of coats; that he, Glasser, does not know whether the defendant brought in the coat of Anna Rosen or not; that he brought in a mink coat; that he, Glasser, did not ask the names of the defendant's customers; that the defendant had access to the vault; that he, Glasser, told the defendant that if he needed anything to go down and take it; that the defendant "used to come in the store, and he wanted a certain coat, nobody would watch him to go in the vault;" that he would go by himself; that one day the defendant came in the store and told him, Glasser, that he, the defendant, had a couple of garments in the vault, a mink coat and a scarf; that he, Glasser, locked in the vault and found the scarf, but that the mink coat was not there.

The only witness who testified on behalf of the defendant was the defendant himself. He testified that when Anna Rosen first brought the coat to him he told her that he had no vault for storage, but that he would store the coat "in a proper vault, in a good vault to be safe;" that he stored the coat in Glasser's vault,

told Anna Rosen he had stored it there, and that "she was satisfied;" that he was never permitted to go into the vault by himself; that he never took coats out of there himself; that somebody went down to the vault and brought coats up to him; that he never took Anna Rosen's coat out of the vault; that he never saw the coat after he took it to Glasser's; that on one occasion when he was in Glasser's store he said to Glasser, "You still have a coat of mine there;" that Glasser said, "Your coat isn't there;" that he and Glasser went into the vault and found that the coat was not there.

We are of the opinion that the preponderance of the evidence clearly establishes the fact that the defendant was a bailee; that in the circumstances the burden was on him to show that he exercised the care that was required by the nature of the bailment; and that he has failed to make such proof.

In the case of Cuming et al. v. Wood, 44 Ill., 416, the court said (p. 421): "We hold it the more reasonable rule, when the bailor has shown he stored the goods in good condition, and they were returned to him in a damaged state, or not returned at all, that the law should presume negligence on the part of the bailee, and impose on him the burden of showing he exercised such care as was required by the nature of the bailment." The case of Cuming et al. v. Wood, *supra*, was followed in the cases of Schaefer v. Safety Deposit Company, 281 Ill., 43, 50, and Niles v. International Hotel Company, 289 Ill., 320, 327.

Counsel for the defendant contends that there is no evidence of the value of the coat. We do not think that the contention is correct.

The proof of claim made by Anna Rosen to the plaintiffs for the loss of the coat was introduced in evidence, and in the proof of claim it is stated that the cash value of the coat was \$1050. The

evidence shows that the plaintiffs paid that amount to Anna Rosen as indemnity for the loss of the coat.

No evidence as to the value of the coat was introduced by the defendant.

We are of the opinion that in the circumstances there is sufficient evidence of the value of the coat. Johnson v. Canfield-Swigart Company, 292 Ill., 161, 111, 112; Cloyes v. Plantie, 231 Ill. App., 183, 191; Charles R. Gold v. J. Rousse et al., No. 30210, opinion filed in this court, not yet reported.

For the reasons stated the judgment of the trial court is reversed and judgment is entered here in favor of the plaintiffs in the sum of \$1050.

JUDGMENT REVERSED AND JUDGMENT ENTERED
HERE IN THE SUM OF \$1050.00.

Matchett, F. J., and McSurely, J., concur.

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52 - 30300

JOE MITCHELL,
Appellee.

v.

ANTON WAGNER,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

241 I.A. 600

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal Court of Chicago brought by Joe Mitchell, the plaintiff, against Anton Wagner, the defendant, to recover \$500 which the plaintiff alleges he lent to the defendant.

The cause was tried before the court without a jury. The court found in favor of the plaintiff in the sum of \$530 and costs, and entered judgment on the finding. The defendant has appealed from the judgment.

The defendant contends that the court committed reversible error in that the court telephoned the wife and the cousin of the plaintiff and questioned them about the facts in the case.

The abstract does not show any such action on the part of the court.

All of the other assignments of error of the defendant relate to the evidence, and as none of the evidence is abstracted, these assignments of error should not be considered.

The rule is that the appellant is required to furnish a complete abstract showing everything necessary to a determination of the questions involved on appeal, (Kieszkowski v. Eastrom, 179 Ill. App. 73, 75) and that where the testimony is not abstracted the presumption should be indulged that the evidence, is abstracted,

241 I.A. 600

THE COURT ORDERED THE DEFENDANT TO PAY THE COSTS.

THIS IS AN ACTION IN THE CIRCUIT COURT OF CHICAGO, ILLINOIS, BROUGHT BY THE DEFENDANT, THE PLAINTIFF, AGAINST THE DEFENDANT, TO RECOVER \$500 WHICH THE PLAINTIFF ALLEGES HE PAID TO THE DEFENDANT.

THE COURT WAS ADVISED THAT THE DEFENDANT WAS NOT A JURY. THE COURT FOUND IN FAVOR OF THE PLAINTIFF IN THE SUM OF \$500 AND COSTS, AND ENTERED JUDGMENT ON THE FINDING. THE DEFENDANT HAS APPEALED FROM THE JUDGMENT.

THE DEFENDANT CERTAINS THAT THE COURT COMMITTED REVERSIBLE ERROR IN THAT THE COURT DISMISSED THE CASE AND THE JURY IN THE PLAINTIFF AND DEFENDANT FROM THE CASE IN THE COURT.

THE DEFENDANT HAS NOT BEEN ADVISED ON THE PART OF THE COURT.

ALL AT THE COURT'S REQUEST OF THE DEFENDANT, THE PLAINTIFF, AND AS NONE OF THE PLAINTIFF IS INTERESTED, THE PLAINTIFF OF THE PLAINTIFF WILL BE REVERSED.

THE PLAINTIFF HAS THE PLAINTIFF IN ORDER TO FURNISH A COMPLETE RECORD SHOWING EVERYTHING NECESSARY TO A DETERMINATION OF THE PLAINTIFF INVOLVED IN THE PLAINTIFF. THE PLAINTIFF HAS NOT BEEN ADVISED THAT THE PLAINTIFF IS NOT INTERESTED. THE PLAINTIFF SHOULD BE ADVISED THAT THE PLAINTIFF IS NOT INTERESTED.

would sustain the judgment. Glos v. Shedd, 218 Ill. 209, 218;
Love v. Dick, 177 Ill. App. 98, 100.

It is also the rule that the court will not examine the record for the purpose of ascertaining whether a judgment should be reversed. Thornton v. Buus, 120 Ill. App. 422, 424;
Salisbury v. Deutsch, 178 Ill. App. 633, 634.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McCurely, J., concur.

1914-1915. The following is a list of the names of the persons who were members of the Board of Directors of the United States National Bank for the year ending December 31, 1914.

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1914-1915. The following is a list of the names of the persons who were members of the Board of Directors of the United States National Bank for the year ending December 31, 1914.

LOUIS BEIGLER CO.,
Defendant in Error,

vs.

HANS HANSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

241 I.A. 600

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago, brought by the Louis Beigler Company, the plaintiff, against the Anderson Iron Works, the defendant. The statement of claim of the plaintiff is as follows:

"That the defendant gave it a verbal order to furnish and deliver to the building of Hans Hanson at No. 7311 Luella Ave., Chicago, Illinois, two (2) double hung metal windows at a price of \$73.00. Plaintiff alleges that it did make said windows and did deliver said windows to said premises on the 21st day of July, 1924. Plaintiff further alleges that afterward the defendant notified the plaintiff that it wished to return said windows to the plaintiff; thereafter the plaintiff called for and took back said windows; that upon deducting its profits and expenses on said transaction the plaintiff allowed the defendant a credit of \$20.00 on its said bill, leaving due and owing to the plaintiff the sum of \$53.00."

The case was heard before the court without a jury. The court dismissed the action as to the defendant, the Anderson Iron works; entered an order making Hans Hanson a party defendant; found the issues for the plaintiff; assessed the plaintiff's damages at \$53 and costs; and entered judgment against Hans Hanson on the finding. The order making Hans Hanson a party defendant is as follows:

"This cause coming on for trial this 4th day of May, 1925, the court having heard the evidence and the arguments of counsel for the plaintiff and defendant and being advised in the premises. On motion of attorney for the plaintiff for leave to make Hans Hanson additional party defendant the said Hans Hanson being in court as a witness for the defendant and having testified as a witness for the defendant, and the court having jurisdiction of said Hans Hanson, said motion is allowed by the court. The court finds the issues for the plaintiff and against the defendant Hans Hanson and assesses the plaintiff's

1000

THE UNIVERSITY OF CHICAGO

1. The first group of people who are not in the labor force are those who are not in the labor force for any reason. This group includes people who are not in the labor force because they are not in the labor force for any reason.

1990

003 .A.1 145

This is an action in the District Court at New York, brought by the Louis Kligman Company, Inc. against the defendant Iron Works, Inc. Defendant.

The complaint is dated the 1st day of May, 1936.

[illegible]

The above information was obtained from a review of the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

10-11-57

THE UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535

TO: THE ATTORNEY GENERAL
FROM: THE DIRECTOR, FBI

SUBJECT: [Illegible]

[Illegible text follows]

damages at \$53 and costs. Said suit is dismissed as to the defendant, Anderson Iron Works. Judgment on the finding for \$53 and costs against the defendant Hans Hanson."

Counsel for Hanson contend that the judgment against Hanson is void in that it is violative of Section 2 of the Bill of Rights of the Constitution of Illinois, which provides that "No person shall be deprived of life, liberty or property without due process of law."

We think that the contention of counsel for Hanson is correct.

It is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant, until he has been cited to appear and has been afforded an opportunity to be heard; that judgment without such citation and opportunity wants all the attributes of a judicial determination; that such judgment is judicial usurpation and oppression, and can never be upheld where justice is fairly administered. 6 Ruling Case Law, section 442, p. 447.

It is elementary that to authorize a judgment against a person who has not appeared or otherwise submitted himself to the jurisdiction of the court, there must be not only service upon such person, but also a legal return of such service; that until service has been made and a legal return entered, the court is without jurisdiction to enter judgment against a defendant who has not appeared. Albright-Fryer Co. v. Pacific Selling Co., 126 Ga. 498, 500. Service of summons can be shown only by an officer's return. I. C. R. R. Co. v. The People, 189 Ill., 119, 121; Hessler v. Wright, 8 Ill. App. 229, 231.

bar

In The case at/the record does not show that a summons was ever issued or returned as to Hanson; or that the appearance of Hanson was ever entered, either orally or in writing, by himself or by an

attorney. Nor does the record show that the statement of claim was amended after the order of court making Hansen an additional party defendant; nor that a hearing was had after Hansen was made an additional party defendant.

The order of court making Hansen an additional party defendant does not find that Hansen was served with summons or that any summons was ever returned as to Hansen, or that the appearance of Hansen was entered, either orally or in writing. The order merely finds that the court had jurisdiction of Hansen. Such finding is not conclusive. The rule is that if from an inspection of the whole record it is seen that there was no jurisdiction, the finding as to jurisdiction is overcome. Illinois Central Railroad Co. v. The People, *supra*: Forrest v. Fay, 218 Ill., 164, 169.

Counsel for the plaintiff in contending that the court had jurisdiction of Hansen, says: "The defendant was present in court, as a witness, his testimony satisfied the court that he was the real, proper defendant in the case, he was made party defendant on motion of the plaintiff, he submitted to the jurisdiction of the court, objected to the assessment of damages, and afterwards made a motion to vacate the judgment." In support of his contention counsel for the plaintiff cites the case of Hotchkiss v. Vanderpool, 139 Ill. App. 332.

If the testimony of Hansen satisfied the court that Hansen was a proper party defendant, Hansen should have been made party defendant in the proper way by service of summons. The record does not show that Hansen submitted to the jurisdiction of the court; nor does the record show that he objected to the assessment of damages. But even if he had objected to the assessment of damages, it does not appear from the record that he objected as a party to the proceeding. As far as the record shows, he was a stranger to the proceeding, and that as to him the proceeding was coram non iudice.

[illegible]

The order of entry making Hansen an additional party

[illegible][illegible]

It is true that after the entry of the judgment Hanson made a motion to vacate the judgment. But in view of the state of the record, the motion was made by Hanson as a stranger, not as a party to the proceeding.

The case of Hatchkiss v. Vanderpool, supra, cited by counsel for the plaintiff, is not in point, as is evident from the following language of the court (p. 338):

"We cannot see that the court failed in jurisdiction in the assumpsit suit. If nothing else in the proceedings were sufficient to confer that jurisdiction, we think the successful motion of his attorney for a bill of particulars of the claim against him before trial was a general appearance. The defendant then, although not pleading to the declaration, took part in the trial on the question of the assessment of damages and cross-examined the manager on the primary merits of the case. Moreover, he made a motion to set aside the verdict against him on the assumpsit issue. Each of these three things amounted to a general appearance."

Although the judgment is void as to Hanson and he was not a party to the proceeding, Hanson is not precluded from prosecuting this writ of error to reverse the judgment. People v. Evans, 252 Ill., 235, 237, 238; Dannersberger v. The People, 293 Ill., 148, 152, 153; The People v. Coal Belt Electric Ry. Co., 311 Ill., 29, 34.

For the reasons stated the judgment is reversed.

REVERSED.

Hatchett, P. J., and McCarely, J., concur.

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LULA MURRAY,
Plaintiff in Error,

v.

ALBERT W. MILLER and
MARTIN KALLIS, doing business
under the name and style of
Miller-Kallis Fur Shop,
Defendants in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

241 I.A. 600

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal Court of the City of Chicago brought by Lula Murray, the plaintiff, against Albert W. Miller and Martin Kallis, doing business under the name and style of Miller-Kallis Fur Shop, the defendants, to recover \$400 paid by the plaintiff to the defendants for a fur coat which the plaintiff alleges was old, worn out and of poor material, but which was wilfully and fraudulently represented to the plaintiff as being new and of good material.

The appearance of the defendants was entered by attorneys purporting to be attorneys for the defendants. A trial was had before a jury and a verdict was returned against the defendants, and the plaintiff's damages were assessed at \$400. Judgment was entered on the verdict. Motions for a new trial and in arrest of judgment were made on behalf of the defendants, and the motions were denied. On behalf of the defendants an appeal was prayed from the judgment, but was not perfected.

More than thirty days after the entry of the judgment, a motion was made by the defendant, Martin Kallis, to vacate the judgment. The court entered an order granting the motion and stayed the execution as to Kallis. From this order the plaintiff has prosecuted this writ of error.

The only ground on which the plaintiff asks for a reversal of the order is that no petition was filed by Kallis, as required

by section 21 of the Municipal Court Act.

The answer to the contention of the plaintiff is that an additional abstract of record filed on behalf of Kallis shows that a petition was filed by Kallis. The petition is as follows:

"1. Your petitioner, Morton Kallis, respectfully represents unto the Court that on to-wit: January 9, 1934, he was served with an execution by the bailiff of the Municipal Court of Chicago, which execution was directed against Albert Miller and Martin Kallis.

2. Your petitioner further represents that the date of the service of the said execution was the first knowledge that was communicated to your petitioner of the fact that such a case was pending in the Municipal Court and that he was involved in any way.

3. Your petitioner further represents that he was never served with any summons or service of process in the above entitled cause; that he did not authorize Callahan & Callahan or any other attorneys to file his appearance for him; that he had never employed the firm of Callahan & Callahan to transact any of his legal work and that the appearance filed by the said firm of Callahan & Callahan of Martin Kallis was not made for or in behalf of your petitioner and was not made with any authority from your petitioner.

4. Your petitioner further represents that he had dissolved his business relations with Albert Miller, and was not in any way associated with the said Albert Miller at the time of the transaction upon which the cause of action is predicated; that he has any knowledge of any of the facts or circumstances involved in the said transaction.

5. Your petitioner further represents that upon the theory of idem sonans the plaintiff intends to levy upon the goods and chattels of your petitioner upon the judgment procured against Martin Kallis in the above entitled cause.

Wherefore your petitioner prays that an order be entered in the above entitled cause vacating and setting aside the finding and judgment entered herein against the defendant Martin Kallis.

Morton Kallis,
Petitioner.

State of Illinois)
County of Cook) ss

Morton Kallis, being first duly sworn on oath, deposes and says that he is the petitioner in the above entitled cause; that he has read the above and foregoing petition by him subscribed and that the same is true in substance and in fact.

Morton Kallis."

The record does not show that the petition was demurred to by the plaintiff or that any plea was filed by the plaintiff,

THE SECRETARY OF THE BOARD OF TRADE AND COMMERCE
OF THE UNITED STATES OF AMERICA
WASHINGTON, D. C.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

[illegible]

1. The above information was obtained from the files of the Federal Bureau of Investigation, Department of Justice, and is being furnished to you for your information.

1. The first part of the report deals with the general situation of the country and the position of the various groups of the population. It is a very good example of a general survey of a country and its people.

or that the plaintiff in any manner traversed the allegations in the petition.

We are of the opinion that the petition alleges facts sufficient to bring it within the provisions of section 21 of the Municipal Court act, and that the order of the trial court vacating the judgment was correct.

The order is affirmed.

AFFIRMED.

Matchett, F. J., and McSurely, J., concur.

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page 12 of 12

127 - 30385

PEOPLE ex rel. SOL WINTARNITZ,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

241 I.A. 600

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, the City of Chicago, William M. Dever, Mayor of the City of Chicago, and Thomas P. Keane, City Collector of the City of Chicago, from an order of the Circuit court granting a writ of mandamus, directing the defendants to issue to Sol Wintarnitz, the petitioner, a special permit to operate and conduct a jewelry auction for a period of thirteen days beginning with February 14, 1925.

As the period for which the permit was requested has long since expired, we are of the opinion that the appeal should be dismissed. The People ex rel. Melchman v. City of Chicago, 258 Ill., 273.

APPEAL DISMISSED.

Matchett, P. J., and McCurely, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

GEORGE A. RUDNICK,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

241 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, by information, was charged with obtaining money from E. Olivieri by false pretenses. Upon trial he was found guilty and sentenced to six months in the House of Correction and fined \$100.

It is urged for reversal that the information does not charge the commission of a crime. The information, by E. Olivieri, charges that George A. Rudnick falsely represented and pretended to affiant that he, Rudnick, was a collector for the Peoples Gas Light & Coke Company, and affiant, relying on and believing the false pretenses and representations to be true and "then and there being deceived thereby was induced by means and reason thereof to pay over and deliver" to Rudnick a sum of money. It is argued that the word "induced" means influenced only and does not amount to an allegation that the complaining witness did pay any money to Rudnick, the defendant. To say that a person was induced to do a certain thing is equivalent to saying that he was led to do this and imports the act itself. The allegation that by means of the false representations the affiant "was induced" to pay over money imports that he did, in fact, pay the money.

Defendant went to trial without making a motion to quash and the information was sufficient, after verdict, although

it might have been made more formal on a motion to quash. People v. Weber, 152 Ill. App. 102.

The complaining witness, Olivieri, testified that he had a grocery store using gas from the Peoples Gas Light & Coke Company, and that on May 29, 1924, the defendant, Rudnick, came into the store and presented a bill for the Gas company, which the witness paid, giving Rudnick \$7.15 and receiving from him a receipt which Rudnick signed. The witness was positive in his identification of the defendant. The receipt was introduced in evidence and marked as an exhibit. The defendant denied that he had ever seen Olivieri before the trial, denied that he had been in the store or had collected any money from Olivieri and given him a receipt. He testified that the handwriting on the receipt was not his. It is conceded that he was not employed by the Gas company.

It is contended that the testimony of the complaining witness, standing alone, against that of the defendant is not sufficient to warrant conviction. The jury saw and heard the respective witnesses, and their conclusion to believe the story of Olivieri rather than that of defendant will not be disturbed, as the jury had better opportunities to observe the witnesses while testifying.

"The fact that there was only one witness testifying to the commission of the crime and that he was contradicted by the defendant is not, alone, sufficient to justify a reversal." People v. Euzek, 277 Ill. 621.

A further reason for affirming on the evidence is that the receipt, which was an exhibit in the case and submitted to the jury, is not in the record before us. Therefore, the defendant is not in a position to challenge the sufficiency of the evidence. People v. Niehoff, 266 Ill., 103.

Complaint is made of the conduct of the prosecuting attorney on the trial, especially in his cross-examination of

witnesses and his argument to the jury. Some of the things said perhaps were uncalled for, but nothing of sufficient importance appears to have occurred which would require a reversal.

It is asserted that there were too many instructions on the doctrine of reasonable doubt. The brief does not inform us as to the number given nor their contents. We are in sympathy with the criticism against lengthy and numerous instructions on reasonable doubt. In the instant case it would seem that such instructions would favor the defendant. In any event, they were not objected to. Counsel for defendant did make an objection to the court's failure to give certain instructions, but this was after the jury had retired. We are not told of the particular instructions counsel referred to.

No sufficient reason is presented for a reversal, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

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SAM MONACHELLO,
Appellee,

vs.

WALTER E. HELLER & COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

241 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit in trover and trespass, plaintiff alleging that defendant wrongfully took and converted a motor truck belonging to him. Defendant pleaded that it took the truck by virtue of the provisions of a chattel mortgage. Upon trial plaintiff had a verdict on which judgment was entered for \$1544.40.

In 1921 Monachello was in the trucking business. Defendant dealt in commercial paper, specializing largely in what was called automobile or truck paper. Where the balance of the purchase price of an automobile or truck was secured by chattel mortgage, the dealers holding the notes would sell them to defendant at a discount. Robert A. Dunn was the agent and representative in Chicago of the Titan Truck Company of Milwaukee, and had done considerable business with defendant, selling it such chattel mortgage notes.

In April, 1921, Monachello, Dunn and another party, Rudolph Vedicka, became interested as subcontractors in a contract with Pronger & Black for hauling concrete to be used in the construction of a roadway in Cook County. On April 14th Monachello gave Dunn, as agent for the Titan Truck Company, an order for a truck, paying \$500 down and \$1500 to be paid on delivery of the truck, and the balance in twelve monthly instalments evidenced by notes secured by chattel mortgage.

ATTEST: JOHN D. BROWN, CLERK
OF COOK COUNTY.

241 I.A. 601

THE COURT OF COOK COUNTY, ILLINOIS, HAS ORDERED THAT THE

DEEDS IN A GIFT IN COOK COUNTY, ILLINOIS, BE

RECORDED IN THE OFFICE OF THE CLERK OF COOK COUNTY, ILLINOIS.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL

AT CHICAGO, ILLINOIS, THIS 10TH DAY OF MAY, 1901.

JOHN D. BROWN, CLERK OF COOK COUNTY, ILLINOIS.

DEEDS IN A GIFT IN COOK COUNTY, ILLINOIS, BE

RECORDED IN THE OFFICE OF THE CLERK OF COOK COUNTY, ILLINOIS.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL

AT CHICAGO, ILLINOIS, THIS 10TH DAY OF MAY, 1901.

JOHN D. BROWN, CLERK OF COOK COUNTY, ILLINOIS.

DEEDS IN A GIFT IN COOK COUNTY, ILLINOIS, BE

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JOHN D. BROWN, CLERK OF COOK COUNTY, ILLINOIS.

DEEDS IN A GIFT IN COOK COUNTY, ILLINOIS, BE

RECORDED IN THE OFFICE OF THE CLERK OF COOK COUNTY, ILLINOIS.

Dunn had some conversation with Walter E. Heller, president of the defendant company, with reference to this sale and the proposed chattel mortgage, and on May 5, 1921, defendant wrote Dunn to the effect that its investigation of Monachello with reference to giving him credit prompted it to refuse to buy his notes and the chattel mortgage "unless changes are made as stipulated." May 17, 1921, Dunn executed the notes for the balance due on the truck and a chattel mortgage, which were delivered to the defendant. On the same day Dunn, Monachello and Vodicka executed an assignment to Walter E. Heller of all money that might become due under the Pronger & Black contract. This assignment provided that, after allowing \$15 a day for the operating expenses of the truck, fifty per cent of the money as paid by Pronger & Black, should be credited on the Dunn notes and the remaining fifty per cent on the Vodicka notes. The Vodicka transaction is not involved in this controversy.

This assignment was drawn by the attorneys for the defendant, and in it Dunn, Monachello and Vodicka are described as "copartners doing business as Highway Service Company." They were not, in fact, general partners; it would be more accurate to say that each had some interest in the Pronger & Black contract, but such interests were several and not joint.

On the same day, May 17th, Monachello gave Dunn his check for \$1500, receiving a receipt therefor and also an order from Dunn on the Titan Truck Company in Milwaukee, Wisconsin, for the truck. Monachello went to Milwaukee, the truck was delivered to him, he brought it back to Chicago, and it was used by him on the Pronger & Black contract in laying concrete pavement. He was in possession of the truck from the time it was delivered to him, using it on this job until the work was suspended on account of cold weather in December, 1921, when he stored it in the garage next

... had some conversation with Walter H. Heller,
President of the National Company, with reference to this case
and the proposed amended mortgage, and on May 12, 1932, defendant
wrote him to the effect that the investigation of Kennecott with
reference to giving him credit amounted to be refused to pay the
notes and the amended mortgage "unless changes are made as set-
forth." May 17, 1932, defendant executed the notes for the balance
due on the truck and a amended mortgage, which were delivered to
the defendant. On the same day, Kennecott and Vothco
executed an assignment to Walter H. Heller of all money that might
become due under the Kennecott & Vothco contract. This assignment
provided that, after allowing six days for the operating expenses
of the truck, the net sum of the money to be paid to Heller
should be retained on the same notes and the remaining
fifty per cent on the Vothco notes. The Vothco transaction in
fact involved in this controversy.
... This assignment was given by the attorney for the
defendant, and in the same, Kennecott and Vothco are described
as "partners being known as Vothco Service Company." They
are not, in fact, partners; it would be more accurate to
say that they had some interest in the Kennecott & Vothco
contract. Defendant was aware of this fact.
On May 20, 1932, defendant paid to the
Heller the money, including a certain amount and also an order
from him to the Utah Trust Company in Salt Lake City, Utah,
for the same amount. Defendant sent to Heller, the same day following
the order, a check for the same amount, and it was paid by him to
Heller. It is true that the first of the Heller was delivered to him,
which it is well known that the same was deposited on account of

to his home. The money coming to Monachello from Pronger & Black was paid to defendant Heller. In April, 1922, Monachello took the truck for use on a road job in DuPage County. In May, 1922, there was \$285.30 due on the chattel mortgage notes held by defendant.

At this time and while Monachello was in possession of the truck on the work in DuPage County, defendant took from Dunn a chattel mortgage dated May 26, 1922, purporting to convey Monachello's truck to secure a loan to Dunn; the balance of \$285.30 due on the first chattel mortgage was included in this new loan, and the old note was cancelled and surrendered. Monachello knew nothing of this new mortgage. Subsequently Dunn disappeared and apparently none of the parties has been able to find him. In October, 1922, while the truck was in the possession of Monachello and in DuPage County, defendant seized it under this last mortgage and stored it.

Monachello then called at the office of defendant and informed Walter Heller that the truck belonged to him. Heller testified that he replied that he believed it was Dunn's truck and had taken it under this new mortgage and note, and he inquired how it happened that the first mortgage and notes were executed by Dunn if the truck belonged to Monachello, and that Monachello stated that he and Dunn had agreed that Monachello's credit was not sufficient, that Dunn's credit had been established with defendant, so to finance the matter and get the defendant to buy the notes it was agreed that Dunn should sign the mortgage and notes and not inform the defendant that it was Monachello's truck. Heller insisted that he would not release the truck until the balance due on the last mortgage note was paid. This meeting in October, 1922, was the first time that Monachello had ever met the

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at this time and while defendant was in possession of the truck on the work in Wayne County, defendant took from them a checkered mortgage dated May 15, 1933, purporting to come very defendant's father to secure a loan to them; the balance of \$500.00 was on the first checkered mortgage was included in this new loan, and the old note was cancelled and surrendered. Defendant later advised of this new mortgage. Subsequently when defendant and apparently none of the parties had been this is the fact. In October, 1935, while the truck was in the possession of defendant and in Wayne County, defendant signed a note for the last mortgage and stored it.

[illegible]

defendant's officers.

Plaintiff, Monachello, testified that he did not know the particulars concerning the original notes and mortgage; that he himself did not sign any notes, that he inquired of Dunn why this transaction with the defendant could not be under his own name, and was told by Dunn that he, Monachello, did not have enough credit, so that defendant would not carry the notes under his name.

After the truck was taken by defendant, Mrs. Cornille Parella, a cousin of Monachello's, had some negotiations with Heller and gave defendant her check for \$1544.40 and received from defendant a bill of sale conveying to her from defendant the truck in question for a consideration of \$1544.40. Plaintiff testified that he was not present when this took place, but Heller says that he was. Afterwards Monachello took the truck from the place where defendant had stored it.

It is earnestly argued that a fraud was perpetrated on the defendant by Monachello in permitting and leading defendant to believe that Dunn was the owner of the truck. It is not claimed that Monachello made any representation to this effect, but that his silence for many months, during which time he knew that Dunn had signed the notes and chattel mortgage held by defendant, led defendant to believe that Dunn owned the truck. There is persuasive evidence that defendant knew that Dunn did not own the truck and that Monachello did. From their course of business with Dunn, defendant would know that Dunn did not purchase these trucks for himself but as agent for the Titan Truck Company was selling them to different purchasers. The fact that before the mortgage was made the credit of Monachello was investigated and disapproved by defendant and that defendant suggested a plan for handling the matter and then Dunn made the notes and mortgage and the payments to Monachello

under the Pronger & Black contract were assigned to defendant, leads clearly to the conclusion that defendant not only knew that Dunn was not the real owner of the truck, but also devised this plan of carrying on the transaction. At least there is sufficient in the record to justify the jury in so believing.

Under the competent evidence there could have been no other verdict than guilty for the following reasons. The chattel mortgage of May 26, 1932, was acknowledged by Robert A. Dunn by A. E. Reihangen, his attorney in fact, before James A. Kearns, Clerk of the Municipal court of Chicago. Miss Niehagen was an employee of defendant in its office, which is significant as to the relations between Dunn and the defendant.

At the time of the execution of this mortgage Dunn resided in Riverside, Illinois, which is not in the city of Chicago, and the truck described in the chattel mortgage was in the possession of Bonachello in DuPage county. There was no acknowledgment of the chattel mortgage except before the Clerk of the Municipal court of Chicago. Upon motion the trial court struck this mortgage from the evidence as invalid. This ruling was proper. The statute on mortgages provides that, if the mortgagor is a resident of the state at the time of making the acknowledgment, it shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, or if there is no justice of the peace of the town or precinct or there is no such justice of the peace, said instrument shall be acknowledged before the clerk or deputy clerk of the Municipal court "in the district in which the mortgagor resides, or if there be no such clerk or deputy clerk, before the county judge in the county in which the mortgagor resides." Section 2, Mortgages. By section 1 it is provided that, unless the mortgage is so acknowledged, it shall not be valid against the rights and interests of any third person.

As plaintiff, Monachello, was in actual possession of the truck and had no knowledge of the execution of this mortgage, and as it was not properly acknowledged as required by the statute, it was void as to him. Guest Piano Co. v. Moore, 152 Ill. App. 529.

With this chattel mortgage withdrawn from the consideration of the jury, there was nothing shown to justify the taking of the truck by the defendant and the wrongful conversion was established.

The damages, \$1544.40, assessed by the jury are challenged on the ground that there is no competent evidence to sustain the finding. The truck was bought in 1921 for \$4550. In October, 1922, it was conveyed by defendant to Mrs. Parrella, for \$1544.40. While other and better evidence might have been introduced, showing more definitely the value of the truck at the time of the conversion, yet considering the purchase price in 1921, its use for less than two years, and the consideration in the bill of sale, there was some evidence on which to fix the value. It is a fair inference that it was worth at least \$1544.40, and we will not disturb the verdict because of the absence of more testimony as to its value.

Counsel for defendant present a number of points in argument which we do not discuss for the reason that in our opinion they cannot change the inevitable finding of the jury. If the record justified the conclusion that defendant knew all the time that Monachello and not Dunn owned the truck, and the withdrawal from the evidence of the chattel mortgage of May 26, 1922, was proper, considerations of any estoppel or alleged settlement of the controversy are not material. Neither is there basis in the record for the assertion that, as there is no evidence of special damage, the most that could be recovered is nominal damages on the ground that the truck was restored to

and in fact, undoubtedly, was in actual possession of the truck and had no knowledge of the execution of this mortgage and as it was not properly acknowledged as required by the statute, it was void as to him. West v. Bland, 158 N.Y. App. 300.

That these checks were withdrawn from the bank at the time of the trial, there was nothing shown to justify the taking of the truck by the defendant and the wrongful conversion was established.

The amount, \$1544.40, advanced by the bank was challenged on the ground that there is no competent evidence to establish the liability. The truck was bought in 1927 for \$1500. In October, 1928, it was conveyed by defendant to Mrs. Kervill. On April 4, 1931, other and better evidence might have been introduced, showing more definitely the value of the truck at the time of the conversion, but considering the purchase price in 1927, for the year then two years, and the consideration in the bill of sale, there was some evidence on which to fix the value. As to the interest there it was worth at least \$1544.40, and so will not disturb the verdict because of the amount of the judgment as to the value.

Defendant for judgment presents a number of points in support of his case. He is not liable for the reason that in the evidence they cannot obtain the liability finding of the jury. It is not possible to conclude that defendant knew all the facts and circumstances and not know when the truck, and the defendant from the evidence of the checks mortgage of May 1928, was proper, consideration of any evidence or alleged consideration of the mortgage was not material. Neither is there any basis for the assertion that, as there is no evidence of actual fraud, the bank must be held liable for the amount advanced by the bank.

the plaintiff. Defendant did not restore the truck to plaintiff but sold it to Mrs. Parrella, and the record is silent as to any arrangement or agreement between the latter and plaintiff as to the possession or ownership of the truck. Non constat, Mrs. Parrella still owns it.

The instruction given at the request of plaintiff is criticized as excluding from consideration of the jury every matter of justification and defense. The instruction, in substance, was that the issues should be found for the plaintiff and against the defendant if the jury found that at the time of the taking of the truck it belonged to plaintiff. The instruction omits the theory which defendant sought to establish by evidence, but plaintiff is obliged only to present the law correctly in his instructions upon his theory of the case, and it is not necessary in an instruction to negative matters of defense. Mount Olive Coal Co. v. Rademacher, 190 Ill., 538; Sparta Produce Exchange v. Wilson & Co., 223 Ill. App. 126. Even if the instruction was open to the criticisms made, we should not reverse, as a finding for the plaintiff was the only one properly returnable upon the record.

No convincing reason is presented for a reversal, and the judgment is therefore affirmed.

AFFIRMED.

Katchett, P. J., and Johnston, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS
ex rel. Anton Ezerskis,
Appellee,

vs.

WILLIAM B. DEVER, Mayor of the
City of Chicago, et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 601

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order awarding a writ of mandamus directing the defendants to issue a license to the relator, Anton Ezerskis, to conduct a retail beverage business at number 4558 South Paulina street in Chicago. Relator does not appear in this court to defend the issuance of the writ.

It is well established by many decisions that a writ of mandamus should not issue unless the party seeking it shows a clear right thereto and a corresponding legal duty on the part of the defendant to perform the act, that the granting of a license of this sort is within the discretion of the Mayor of the City of Chicago, and the writ of mandamus will not issue unless there is a clear abuse of such discretion. People v. Webb, 256 Ill., 364.

By defendants' answer it was denied that relator ever applied to the Mayor for a license and that his application therefor was refused. The purported application is not preserved in the record before us and there is nothing to show that it was in compliance with the requirements of the ordinance. Such an application, if made, should have been offered in evidence or

1890

OFFICE OF THE
SHERIFF OF THE COUNTY OF
SHERMAN, TEXAS

STATE OF TEXAS

IN SHERMAN COUNTY

WITNESSETH THAT I, THE SHERIFF OF THE COUNTY OF SHERMAN, TEXAS, DO HEREBY CERTIFY THAT THE ABOVE NAMED PERSONS ARE THE OWNERS OF THE LANDS HEREIN DESCRIBED.

FOR A.I. 123

THESE LANDS ARE BEING OFFERED FOR SALE BY THE SHERIFF OF THE COUNTY OF SHERMAN, TEXAS.

THE LANDS ARE BEING OFFERED FOR SALE BY THE SHERIFF OF THE COUNTY OF SHERMAN, TEXAS.

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preserved in the bill of exceptions. As this was not done, it is not before us.

By answer defendants also asserted that relator did not in fact intend to operate said place of business himself, but was attempting to secure a license in his name for the use of the former owner, whose license had been revoked, thereby to defeat the valid existing ordinances of the City of Chicago. These allegations were not denied by replication, and they are therefore admitted on the record by the pleadings. People v. City of Rock Island, 213 Ill., 488, 491.

It appears in evidence that on inquiry by an investigating police officer as to whether relator had a bill of sale or a lease, or anything to show that he was a bona fide owner of the business at the place in question, relator replied that he had not. There was also evidence tending to show that the business continued in charge of the former owner and his son and not the relator.

Upon the record before us relator was not entitled to the writ, and the order awarding it is reversed.

REVERSED.

Matchett, P. J., and Johnston, J., concur.

preserved in the bill of exchange. As this was not done, it is not binding.

By analogy, the defendant also asserted that the bill was not in fact intended to operate as a bill of exchange, but was intended to operate as a receipt in his name for the use of the

plaintiff, and that the bill was not intended to operate as a bill of exchange, but was intended to operate as a receipt in his name for the use of the

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plaintiff, and that the bill was not intended to operate as a bill of exchange, but was intended to operate as a receipt in his name for the use of the

145 - 30404

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

LUTHER H. THOMPSON,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

241 I.A. 601

MR. JUSTICE MCGURLEY DELIVERED THE OPINION OF THE COURT.

Information was filed charging that defendant, on or about May 27, 1935, violated the statute making it a misdemeanor during the life of a chattel mortgage for any mortgagor to sell, transfer, conceal, take, drive or carry away, or in any manner dispose of the mortgaged property, or any part thereof, or cause the same to be done, without the written consent of the holder of the incumbrance. Section 8, chap. 95, Illinois Statutes (Cabill.) On trial by the court defendant was found guilty and fined \$500.

A number of points are presented as grounds for reversal, but one is sufficient, namely, that the facts proven fail to establish that the defendant was guilty of the crime charged.

By chattel mortgage dated July 17, 1934, defendant conveyed to Joseph Glaser twenty-five pool tables, three billiard tables and other paraphernalia and equipment of a poolroom. One day (date uncertain) Glaser called at the poolroom and found some men with a truck preparing to move the tables away. A police officer was called and the moving of the tables stopped. Some lumber and beaver board, gymnasium equipment and a lunch counter were moved, but these things are not covered by the chattel mortgage. No one testified that the property covered by the mortgage was removed from the premises, and the defendant and the truckmen say

that none of the mortgaged property was removed. The defendant testified that all of the mortgaged property was still on the premises, and Glaser's testimony was not definitely to the contrary. The trial Judge, evidently wishing to ascertain the facts for himself, sent his bailiff to the premises to examine the property. The bailiff did so and reported, as appears from the statement of the Judge in the record, that "all of the stuff is there." Upon this showing defendant should have been found not guilty.

The court, however, proceeded to inquire into the condition of the pool and billiard tables, and from the statement of his bailiff and some testimony evidently was of the opinion that defendant had taken some of the tables apart and had put them together again, but so negligently that they were not in as good condition as they were originally. One witness, experienced in operating billiard rooms, testified that he examined the tables in question and found that several of them were not in line and the covers not properly placed, and gave his opinion as to the cost of putting them in good condition. It is quite evident that the trial court imposed the fine on defendant not because he was guilty of the crime charged, but as compensation to the prosecuting witness, Glaser, for what it was thought it would cost to put the tables in good condition. Of course, a judgment to compensate Glaser for damages could not be entered in this action, which is a criminal prosecution.

For the reason above indicated the judgment is reversed.

REVERSED.

Matchett, P. J., and Johnston, J., concur.

that none of the mentioned property was removed. The statement

compiled that all of the mentioned property was still on the

premises, and Glasser's statement was not definitely to the con-

trary. The final badge, evidently wishing to ascertain the prop-

erty for himself, and his ability to the question to examine the prop-

erty. The witness did not report, as appears from the state-

ment of the badge in the record, that "all of the state is property."

From this showing defendant should have been found not guilty.

The court, however, proceeded to instruct into the

condition of the good and William Jones, and from the statement

of his father and some testimony evidently was of the opinion that

defendant had taken some of the stolen goods and had put them in

another place, but so negligently that they were not in as good con-

dition as they were originally. One witness, experienced in ap-

praising stolen goods, testified that he examined the table in ques-

tion and found that several of them were not in line and the

last mentioned witness, who gave the opinion as to the state of the

goods to be good merchandise. It is well known that the state

defendant did not as defendant had evidence to the effect that

defendant was not in possession of the stolen goods, and

defendant, who was in the state of mind as to the state of the

goods, was not in the state of mind as to the state of the

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163 - 30422

RAGUL W. VANNIER,
Appellant,

vs.

DANIEL J. McMAHON and
ERNEST C. RENNIF,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

241 I.A. 602

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an action for false imprisonment, in which defendant McMahon only was served. Upon trial the court instructed the jury to find for the defendant and judgment was accordingly entered, from which plaintiff appeals.

Both plaintiff and defendant are attorneys at law. The case was tried somewhat informally, and the court may have erroneously ruled as to the admissibility of certain evidence, but considering all of the evidence, including that offered to which objection was made, plaintiff was not entitled to have the case go to the jury; so such errors are unimportant.

Plaintiff was defendant in an action brought in the Circuit court of Cook county by his wife, Irma Fay Vannier, in a proceeding for separate maintenance, in which the firm of McMahon & Cheney represented the complainant.

was filed

A petition for a writ of ne exeat against Mr. Vannier, which was issued, directing the sheriff to summon him to appear and answer the bill, and to commit him to the County jail on failure to give bond. A deputy sheriff took Vannier in custody as he was leaving the Municipal court of Chicago and brought him to the sheriff's office, where he was detained about two hours and then released upon giving bond. Defendant McMahon was present when Vannier was arrested.

2111.008

THE JUDGE'S DECISION WAS BASED ON THE COURT.

THIS IS AN ACTION FOR INJURY TO REPUTATION, IN WHICH

THE PLAINTIFFS HAVE BEEN ADVISED THAT THE COURT HAS

DECIDED IN FAVOR OF THE PLAINTIFFS AND JUDGMENT WAS

ENTERED IN THEIR FAVOR. THE PLAINTIFFS WERE

NOT PRESENT AT THE HEARING AND THEREFORE NO JURY

WAS IMpaneled. THE COURT HAS DECIDED IN FAVOR OF THE

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ENTERED IN THEIR FAVOR. THE PLAINTIFFS WERE

The declaration does not aver that defendant acted with malice, but without any reasonable or probable cause. This is not an action for malicious prosecution, for in such cases it is necessary to aver malice. Lelli v. Rayson, 2 Ill., 272; Beckman v. Menge, 82 Ill. App. 228; Habertson v. City of Marion, 97 Ill. App. 332; Watters v. De La Matter, 109 Ill. App., 334; Levinson v. Thomas, 174 Ill. App. 68.

It is undisputed that the Circuit court is authorized to issue the writ of ne exeat. Paragraph 3, chapter 97, Illinois Statutes. When the court has jurisdiction of a subject matter, it has the power to decide all matters involved, and such jurisdiction does not depend upon a rightful decision as to such matters or errors in the exercise of such power. O'Brien v. The People, 216 Ill., 354. Applying these considerations, it follows that the Circuit court of Cook county, having jurisdiction of the separate maintenance proceeding, had the power to issue the writ of ne exeat, and it is immaterial respecting jurisdiction whether that power was rightfully or wrongfully used or the proceedings in proper form.

Whenever an injury to a person is occasioned by legal process of a court of competent jurisdiction, trespass for arrest and false imprisonment will not lie against the attorneys in the case. Bassett v. Bratton, 86 Ill., 152. Imprisonment under legal process of a court, having jurisdiction of the subject matter, cannot be made the basis of an action for false imprisonment against the attorneys. Process under such circumstances constitutes full justification not only of the officer who serves it and the magistrate who issues it, but of the attorneys representing the party at whose instance it is issued. Feld v. Loftis, 240 Ill., 105.

The Commission has not yet received any information regarding the activities of the various groups and individuals mentioned in the report. It is, however, aware of the fact that the activities of these groups and individuals are of a serious nature and that they are likely to be of a subversive character. It is, therefore, necessary for the Commission to continue its investigation of these activities and to take such steps as may be necessary to prevent the activities of these groups and individuals from being of a subversive character.

Whatever justification plaintiff may have for criticism of the proceedings upon the trial, taking into consideration the entire record, including the rejected evidence, he was not entitled to maintain his action, and the instruction to the jury to find for the defendant was properly given. The judgment was therefore right and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

However, inclusion of this may have for

the purpose of the investigation, the total, but not the

relative of the entire record, including the rejected evidence,

as was suggested in connection with the testimony

in the first instance for the purpose of the investigation.

Therefore, the investigation should be continued.

Very truly,
Yours,

Respectfully,
J. Edgar Hoover

cc-

to be - 100

173 - 30434

THE BUCKMAN COMPANY, a Corporation,
Appellee,

vs.

IRVING ISADOR, Trading as Irving
Isador & Co.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 602

MR. JUSTICE McSHANEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for an amount which we assume to be \$539. This was the amount of the verdict, but the abstract fails to show the entry of any judgment.

This is a fourth class case and the only point presented by the defendant for reversal is that the statement of claim is insufficient, citing Gilman v. Chicago Railway Co., 268 Ill., 305. As the abstract does not set out the statement of claim but only refers to it as "Statement of claim," we cannot pass upon its sufficiency. It is the well established rule that the abstract must show matters relied on for reversal, and that the reviewing court will not examine the record to find grounds for reversing. Beterding v. Central Illinois Public Service Co., 223 Ill. App., 374.

If the statement is as printed in defendant's brief, it is not open to the objection made. The claim is for goods, wares, and merchandise sold and delivered, with detailed information as to the prices^{and} includes a claim for interest because of defendant's wilful and vexatious delay in paying the account. Even in a tort action like the Gilman case, supra, it is sufficient if the statement reasonably informs the defendant of the nature of the case he is called upon to defend, and insufficiencies in form are cured by verdict. Sher v. Robinson, 298 Ill., 181. It has been

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There are no other papers in the collection that appear to be related to the subject.

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repeatedly held that in a fourth class case upon a contract, a statement is sufficient which states the account or nature of plaintiff's demand and gives information that will reasonably inform the defendant of the nature of the demand. Chapter 37, section 428, Ill. Stat. (Cahill): Kennas v. Bagan, 289 Ill. App., 280; Woolton v. R. C. Crist, Inc., 210 Ill. App. 62; Edgerton v. C. R. I. & P. Ry. Co., 246 Ill., 311.

There is no merit in defendant's appeal, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

The following is a list of the names of the persons who
 were present at the meeting held on the 1st of January
 1900, at the residence of Mr. J. H. Smith, at
 No. 123 Main Street, New York City. The names are
 given in alphabetical order, and are followed by the
 names of the persons who were present at the meeting
 held on the 1st of February, 1900, at the residence
 of Mr. J. H. Smith, at No. 123 Main Street, New
 York City. The names are given in alphabetical order,

and are followed by the names of the persons who

were present at the

meeting held on the 1st of February, 1900, at the

182 - 30443

HADRIAN H. BAKER,
Appellee,

vs.

EDWARD J. LENNARTZ,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 602

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Baker, brought suit alleging a contract with defendant, Lennartz, whereby he was to render services in connection with the claim of Lennartz against the City of Chicago for damages caused by the City in lowering the grade of the sidewalk in front of Lennartz's property; that defendant agreed to pay plaintiff \$500 for such services, which were performed by plaintiff. Defendant denied the contract and that plaintiff performed the services alleged. Upon trial by the court plaintiff had judgment for \$500, from which defendant appeals.

The chief question involved is one of fact. Lennartz had sued the City for damages to his property, and apparently was dissatisfied with the slow progress of the case. Frank L. Yarnall, a real estate man, was lunching with Lennartz, who was expressing himself as dissatisfied with this delay. Baker joined them and was introduced to Lennartz by Yarnall. Yarnall suggested to Lennartz that Baker was a man of experience and wide acquaintance, and that he might help him in the matter. The three men talked it over and Lennartz expressed a willingness to have Baker's services. Yarnall said that Baker should receive \$500 for his work, and Baker testified that to the inquirer, "How about that?" Lennartz replied, "Sure." A memorandum was drawn up by Yarnall, directed to Baker and to be signed by Lennartz. This draft was read by Yarnall to the other two men, and it was understood that it was to be subsequently typewritten. This draft was in evidence and sets forth in

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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See also: [Bibliography](#)

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Figure 1. The effect of the concentration of the polymer on the gelation time of the epoxy resin.

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^a Data are from the 1990 Census of the United States.

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THE SECRETARY OF THE ARMY, WASHINGTON, D. C.

14. REMARKS: NO DATA

detail the claim of Lennartz with reference to the damages to his property and the suggestion that Lennartz would prefer to adjust the matter out of court, as his health was not good and he wished to go South for the winter. Yarnall says this draft was drawn at the request of Lennartz and delivered to Baker. Lennartz and Baker then made an engagement to call at the Corporation Counsel's office. They afterwards called at the Corporation Counsel's office and had an interview with Mr. Leon Hornstein, the First Assistant Corporation Counsel for the City, and discussed Lennartz's claim for damages against the City; Baker's position being that if there was to be a settlement it should be concluded speedily. Hornstein promised to take the matter up with Mr. Beam in the Corporation Counsel's office, as he had charge of that class of claims. Evidence was introduced tending to show that Baker was active in the matter, telephoning to Lennartz and calling at the Corporation Counsel's office and interviewing Hornstein a number of times. Shortly thereafter Lennartz and the counsel for the City came to an agreement and a settlement of his claim against the City was made. When plaintiff requested payment of \$500 for his services, defendant refused to make payment, claiming that the case had been settled by his attorney, Mr. Ashton, and not by Baker.

The above, with other matters appearing in the record, establishes the fact that defendant did agree to accept Baker's services in furthering the settlement of his claim against the City. Lennartz says that he understood these services were to be merely in a friendly way without compensation. But as Baker and Lennartz had never met until brought together by Yarnall, this version of the arrangement is highly improbable. The testimony of Baker and Yarnall and of Lennartz, taken together with ^{the} fact that Lennartz went with Baker to see Hornstein and discussed the matter, makes it impossible on any reasonable ground to conclude that there was no contract of employment.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

2. The second of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

3. The third of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

4. The fourth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

5. The fifth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

6. The sixth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

7. The seventh of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

8. The eighth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

9. The ninth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

10. The tenth of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. This is a serious matter, and it is the duty of the Commission to investigate it as soon as possible.

Yarnall and Baker testified that Lennartz agreed to give Baker \$500. Baker says further that as he and Lennartz were going to the office of the Corporation Counsel he told Lennartz in substance that if Yarnall had any claim he wanted Lennartz to pay him separately, and that he, Baker, wanted his "\$500 separately." Lennartz says that he did not agree to pay Baker \$500, but does not deny that this figure was mentioned and says that he does not remember. Whether or not Lennartz agreed to pay \$500 depends upon the credibility of the witnesses. The trial court had superior opportunities to ours to determine this from observing them while testifying. Under the circumstances we would not be justified in saying that the trial court should not have accepted the story of plaintiff's witnesses. Ashton, defendant's attorney, testifying on his behalf, stated that if Baker did hasten the settlement his services would be reasonably worth \$500.

It is earnestly argued that Baker rendered no services of value and that the case would have been settled regardless of anything he did. This suit is not on quantum meruit, but on a contract for a certain consideration to be paid for services rendered. As the evidence tends to show that services were rendered, it was not necessary for plaintiff to prove that he was the controlling factor in bringing about a settlement. However, it is a fair inference that the persistent efforts and activity of Baker did have the effect of bringing about an earlier settlement than might otherwise have been made.

Defendant argues that the contract between Baker and himself was void as against public policy. The supporting cases cited are not applicable to the present situation. We are referred to no decisions relating to an agreement to employ one to conduct negotiations looking to a settlement of differences between opposing parties. The fact that the City of Chicago was one of the parties

in the suit brought by Lennartz does not change the character of the services rendered. A contract to induce or encourage litigation might be void, but we are not aware of any decisions holding void a contract which has for its object the settlement of differences between parties.

The case was tried in a somewhat irregular and informal manner and there were errors in the rulings upon the admissibility of evidence. However, as the case was tried by the court without a jury, we will assume that the court considered only the competent evidence. In any event, whatever errors were committed upon the trial are not of sufficient importance to require a reversal.

Stripped of all superfluous matter, of which there is much, the evidence tends to establish the contract of employment for the sum of \$300 and services performed by the plaintiff pursuant to such contract.

We cannot say that the conclusion of the court was contrary to the weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

191 - 30452

CITY OF CHICAGO,
Appellee,

vs.

CHARLES REISZ,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 602

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with exhibiting and selling an indecent magazine known as "Art Lovers," of an immoral and scandalous nature, in violation of Section 2668 of the Chicago Municipal Code. Upon trial he was found guilty by a jury and fined \$50. From judgment on the verdict defendant appeals, claiming that the evidence is insufficient to sustain the conviction.

A policewoman testified that she bought the magazine called "Art Lovers" from the store of the defendant in Chicago, and it was introduced in evidence and marked as an exhibit. It is not in the bill of exceptions filed in this court. As the conclusion of the jury as to its character was based solely upon an inspection of this exhibit, in its absence from the record we must presume that the verdict was justified.

The judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

202 A.I.I.S

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the "Black Legion" in the United States. The Commission has received information from the Government of the United States that the "Black Legion" is active in the United States, but it has not received any information from the Government of the United States regarding the activities of the "Black Legion" in the United States.

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200 - 30461

R. J. DOUGLAS,
Appellee,

vs.

LOUIS M. POLAKOW,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 602

MR. JUSTICE McSURREY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from Louis M. Polakow, William S. Perlman and Samuel Grossman real estate commissions in the sum of \$5,000, resulting from the sale of a certain farm. Perlman and Grossman were dismissed and the action proceeded against Polakow alone. Upon trial by the court a finding and judgment thereon were had for \$5,000 in favor of the plaintiff, from which Polakow appeals.

Plaintiff, R. J. Douglas, was engaged in the real estate business in Waukegan, Illinois, and had the exclusive agency for the sale of a farm owned by one John Clay, in Lake County, Illinois, known as the Clay Farm. On January 10, 1923, plaintiff called on defendant at the latter's office in Chicago, with regard to the sale of this farm and quoted Clay's terms as \$100,000 net cash, the purchaser to pay commissions. January 12, 1923, defendant delivered to plaintiff a contract for the purchase of this farm for \$100,000, net cash, and gave plaintiff his check for \$5,000 as earnest money. At this time, as well as on previous interviews, plaintiff made it distinctly understood that his seller, Clay, would not pay any commissions, and defendant told plaintiff that he was forming a syndicate in which he himself was interested, and that because of his interest he did not expect nor claim any commission but that he expected to take care of plaintiff's commission. The contract of sale purported to be signed by Samuel Grossman as the purchaser,

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241 I.A. 302

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but Grossman testified that he did not sign it nor did he authorize defendant to sign on his behalf. The defendant testified that Grossman had been associated with him in other deals and he thought he would want to come in on this one, and for this reason he signed Grossman's name. February 24th the sale was consummated pursuant to the terms of the contract, the deed running to William S. Perlman, who took title for the purchasing syndicate. At the meeting when the sale was completed, the defendant again stated that the commission would be paid by him. Defendant testified that at this time he had no interest in the purchase, but that some four months thereafter he became the owner of a one-fourth interest in the property. A few days after the deal was closed defendant told plaintiff that originally he had been interested in the deal with Grossman, but that now he was not interested and unless plaintiff split with him on commissions he would get nothing. Plaintiff then agreed to take \$5,000 and give defendant \$2,000, but defendant then requested that plaintiff divide his \$5,000 with two other real estate men. This plaintiff refused to do and the parties separated.

Defendant asserts that the commission was due from the purchaser, and that as he was not the purchaser his promise to pay the commission not being in writing was within the Statute of Frauds as the promise to pay the debt of another. The trial court was justified in concluding that defendant was an original purchaser and that his promise to pay the commission was an original undertaking in his own behalf. It is a reasonable inference that defendant, when he signed the contract with Grossman's name and gave plaintiff his own check for \$5,000 as earnest money, was acting in his own behalf. The fact that Grossman did not become a member of the purchasing syndicate which subsequently bought the property under the contract is not important. Defendant had an interest at

but defendant testified that he did not sign it nor did he authorize
any other person to sign on his behalf. The defendant testified
that the person had been associated with him in other deals and he
thought he would want to come in on this one, and for this reason
he signed the check in his name. Defendant testified that the check was
not cashed at the time of the payment, the check running to William
G. Fayman, who took it for the purchasing syndicate. At the
meeting when the sale was completed, the defendant again stated
that the commission would be paid by him. Defendant testified
that at this time he had no interest in the purchase, but that
some time before the purchase he became the owner of a one-fourth
interest in the property. A few days after the deal was closed
defendant told plaintiff that originally he had been interested
in the deal with defendant, but that now he was not interested and
would plaintiff could take the commission he would not object.
Plaintiff then asked if defendant was not interested in the deal,
defendant then testified that plaintiff could take the commission
about what he would like. Defendant testified that he was not
interested.

Defendant testified that the commission was the same as
before, and that he was not the owner of the property at that
time. Defendant was asked to witness with the parties at
the time of the payment to get the best of the deal. The trial court
was satisfied in concluding that defendant was an original party
to the deal and that the commission was to be paid to him.
Defendant testified that he was not interested in the deal. It is a reasonable inference that
defendant, when he signed the contract with defendant's name, was
not a party to the deal. The fact that defendant did not become a partner
of the purchasing syndicate until after the purchase was made
shows that defendant was not interested in the deal.

the time he promised to pay plaintiff the commission, and his oral promise was made on his own behalf.

It is argued that Churchill and MacGuffin should have been joined as parties plaintiff, but the facts do not support this contention. MacGuffin acted as the attorney for defendant and at one time took him to Waukegan to interest him in property there and together with Churchill showed him about. No effort was made to interest defendant in the Clay Farm, because it was known that plaintiff was the exclusive agent for this. Through the efforts of MacGuffin and Churchill, defendant bought a farm in the vicinity, known as the Keith Farm, and received commissions for this. Plaintiff had no agreement with these men concerning any commission on the Clay Farm. MacGuffin and Churchill had no interest in this particular transaction, which made it necessary for plaintiff to join them as co-plaintiffs in this action.

It is said that plaintiff was not a licensed real estate broker, in that he had no license from the City of Waukegan as required by an ordinance. There is evidence that this city ordinance of Waukegan had become a dead letter; neither Churchill nor MacGuffin, who were real estate brokers there, had any license. However, the ordinance refers to transactions "within the City of Waukegan," while the Clay Farm is outside the city limits of Waukegan. It was not necessary for plaintiff to have a Chicago real estate broker's license. He was not a resident of Chicago and had no office here and had never before negotiated a sale in Chicago; the property itself was not in Cook County, but in Lake County. He did have a broker's license from the State of Illinois.

It is not proven that Churchill and MacGuffin procured defendant as a purchaser of the Clay Farm before plaintiff knew anything about it. These men knew that Douglas had the exclusive agency for this, and their activities in Lake County were

mainly directed toward selling the Keith Farm.

The trial court was justified in finding that defendant was an interested principal, but even if he were not he would be liable upon the theory that, where an agent contracts for the purchase of property without disclosing the name of his principal, he makes himself personally liable. Bickford v. National Bank, 42 Ill. 238; Geiselman v. Reddinghaus, 158 Ill. App. 316; Shine v. Kennealy, 102 Ill. App. 473.

Complaint is made of the rulings of the court upon tendered propositions of law, but if the judgment is proper under the law and facts, the rulings on propositions of law are immaterial.

For the reasons above indicated we hold that the judgment was proper, and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

Page 11

mainly directed toward selling the Ketchikan.

The trial court was justified in finding that defendant

was an interested party, and even if he were not he would

be liable upon the theory that, where an agent contracts for his

principal of property without disclosing the name of his principal,

he makes himself personally liable. Richard v. Richard, 108

101, App. 320; Shin

v. Hennessey, 108 111, App. 410.

Complaint is made of the failure of the court upon

defendant's proposition of law, but in the judgment is proper under

the law and facts, the failure on proposition of law and facts

For the reasons above indicated we hold that the

defendant's proposition, and it is affirmed.

REVEREND

Respectfully,
J. J. ...

CHESTER W. WALLACE,
Appellee.

vs.

EDWARD C. BLANKO,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 603

MR. JUSTICE McSWEET DELIVERED THE OPINION OF THE COURT.

This is a suit for commissions of a real estate broker in which, on trial before a jury, plaintiff had judgment for \$610, from which defendant appeals.

Plaintiff's statement of claim alleged that on or about May 25, 1923, defendant employed the plaintiff to sell certain real estate owned by defendant in Chicago located at the southwest corner of Cicero and Elston avenues and agreed to pay plaintiff a commission of three per cent for his services in procuring a purchaser, and that about June 11, 1923, plaintiff procured a purchaser to whom defendant shortly thereafter sold the premises for \$27,000. By affidavit of merits defendant denied that he employed the plaintiff in any manner and denies that plaintiff was instrumental in bringing about the sale.

The burden of proof was on the plaintiff to prove the contract and that he procured the purchaser. Jackson v. Bohler, 289 Ill. 444. Defendant argues that the verdict is not sustained by the evidence. We are of the opinion that the record supports this point, and that the judgment must be reversed and the cause remanded.

Plaintiff testified that he was a licensed real estate broker in May, 1923; that at this time, in passing, he saw the corner lot owned by the defendant on which was a large "For Sale" sign, giving the name, address and telephone number of the defendant; that thereupon he called him up on the telephone and that he

April 1, 1948

THE SECRETARY OF THE ARMY

WASHINGTON, D. C.

OFFICE OF THE SECRETARY OF THE ARMY

WASHINGTON, D. C.

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MEMORANDUM FOR THE SECRETARY OF THE ARMY

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"gave me the property for sale." The witness said that he had made a written memorandum of the details of this conversation, and on the trial based his recollection of this conversation upon this memorandum. Thereafter plaintiff happened to see a Mr. Samuel Kemon in the neighborhood, who was looking for property with a view to purchasing the same. Plaintiff says that he took Kemon and showed him defendant's property and went with Kemon and introduced him to the defendant, who had some conversation with Kemon as to the price of the property. In July plaintiff called defendant by telephone and was informed that the property had been sold. Plaintiff claimed that he was entitled to a commission, but defendant did not concede this. This was substantially the entire evidence on behalf of the plaintiff.

For the defendant John J. Therman testified that he was a real estate broker and had known the defendant since October, 1922, and had known Kemon seven or eight years; that he had submitted defendant's property to Kemon and his son in November, 1922, and informed defendant of this fact, giving the names of the Kemons. Kemon then made an offer for the property and defendant asked a higher figure. Therman continued with the negotiations, getting the parties gradually together, and finally about four or five months later got them to agree on the price and a contract was drawn which was signed by the parties. Defendant paid Therman a commission of \$400.

Samuel Kemon testified that Therman submitted this property to him in October or November, 1922, six months before he met the plaintiff; that on a certain day he went out alone to examine the property, when the plaintiff "catch me" on the sidewalk; that when the plaintiff saw him he said to the witness, "'That is Mr. Blanco's.' I says, 'I know that before you,' six months before he told me." Kemon confirmed Therman as to the negotiations to

bring the defendant and the Komons in agreement on the price and the resulting contract and sale.

The defendant, testifying, denied that he had any telephone conversation with the plaintiff in May, 1933, and stated that the only telephone conversation was after the sale. His testimony confirmed that of Therman and Komon.

The testimony of these witnesses with other evidence strongly supports the version of the defendant that Therman was the procuring cause of the sale, that Komon was his customer, and the plaintiff, Wallace, was not a factor in the matter.

It is suggested in defendant's brief that the jury was improperly influenced in its verdict by considerations extraneous to the merits of the controversy. We do not determine whether or not this is true; but in any event plaintiff so clearly failed to prove the allegations of his statement of claim by the necessary quantum of proof, and the evidence tending to support the defense is so convincing that we are compelled to hold that the verdict was improper and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

CHARLES S. PATTON,
Appellee,

vs.

MILTON HART,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 603

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

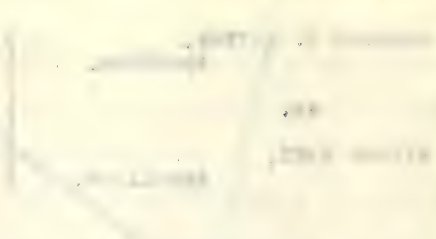
When this case was called for trial no one answered for the defendant. A jury was called, evidence was heard, and a verdict was rendered for plaintiff upon which judgment was entered against defendant for \$1500. Within the term the defendant made a motion to set aside the verdict and judgment, which motion was over-ruled. By this appeal defendant asserts that it was an abuse of discretion for the trial court to over-rule his motion, as his affidavit showed due diligence and also a meritorious defense.

The refusal to set aside default lies within the discretion of the trial court, whose action will not be disturbed unless the discretion is grossly abused. Barrett v. Green City Cycle Co., 179 Ill. 66. But a reviewing court will interfere when it appears that there is an abuse of such discretion. McMurray v. Peabody Coal Co., 281 Ill., 213. A party seeking to have a default set aside must show that he acted with due diligence to protect his rights, and that he has a meritorious defense. Mitsche v. City, 280 Ill., 268.

The affidavit purporting to show due diligence alleged that the case was on the trial call of Judge Halden on June 16th; that at this time Frank D. Shobe, an employee of the attorneys for defendant, who was in charge of the case, was "held" in the trial of a case in another courtroom; that his associate, Walker F. Collins, was watching the call in Judge Halden's courtroom; that about 2:30 p. m., there was a case on trial in Judge Halden's room and several

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When this case was called for trial no one appeared
for the defendant. A jury was called, evidence was taken, and a
verdict was rendered for plaintiff upon the judgment was en-
tered against defendant for \$1000. Within one year the defendant
made a motion to set aside the verdict and judgment, which motion
was denied. The case was then brought on for trial a second time
and the defendant appeared for the trial and was found guilty of the
same offense and was sentenced to the same term of imprisonment.
The case was then brought on for trial a third time and the
defendant appeared for the trial and was found guilty of the
same offense and was sentenced to the same term of imprisonment.
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defendant appeared for the trial and was found guilty of the
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defendant appeared for the trial and was found guilty of the
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The case was then brought on for trial a tenth time and the
defendant appeared for the trial and was found guilty of the
same offense and was sentenced to the same term of imprisonment.

other cases marked ready for trial ahead of this case; that the card which is usually displayed indicating that there would be no further call for that day, was not displayed; that Collins reported this condition to Shobe; that as soon as Shobe finished with his case in the other courtroom he went into Judge Haldom's room and found that this case had been called and submitted to a jury, which had retired to consider its verdict.

It is very doubtful if this presents a case of due diligence on the part of the attorneys. Collins did not report to Judge Haldom the engagement of Shobe, whose actions seem to have been governed by the mere opinion of Collins that the case would not be reached, although it is not alleged that Collins made any inquiry of the clerk or of any ^{of the} attorneys in the prior cases as to whether or not they would be tried or as to the length of time of any such trial. There is ground for the argument that Collins merely jumped to the conclusion that the case would not be reached and could be left without watering. It is generally understood among attorneys that, as long as the usual card announcing no further call is not displayed, all cases on the call for that day may be called for trial. If Shobe was actually engaged in the trial of another case, it was Collins' duty to remain in Judge Haldom's courtroom and report this fact when the case was called for trial.

Even if the attorneys were excusable, they were bound to show that defendant had a meritorious defense before the trial court would be justified in setting aside ^{the} judgment. This affidavit failed to disclose. Plaintiff in his declaration asserted that he was indebted to one Anna Tyrak in the sum of \$1500; that he owned certain personal property and an interest in certain gathered and growing crops and other farm products on a farm in Wisconsin occupied by said Anna Tyrak; that the defendant agreed with plain-

tiff that he, the defendant, would pay said debt of \$1800 owing from plaintiff to Anna Tyrak in consideration of the plaintiff executing and delivering to defendant, Hart, a bill of sale to the personal property and an assignment of all interest in the crops and products of the farm; that relying on these representations plaintiff, Patton, executed and delivered to defendant, Hart, such a bill of sale and an assignment of crops and personal property of the value of \$1800, but defendant did not discharge the indebtedness of plaintiff to Anna Tyrak, by reason whereof said Anna Tyrak procured a judgment against plaintiff for \$1800, and that by reason of the failure of defendant, Hart, to carry out his agreement, plaintiff, Patton, was forced to and did pay the Tyrak judgment. By plea defendant alleged that he did not promise to pay Anna Tyrak \$1800. The affidavit of Shobe presented on the motion to vacate the judgment alleged that the defendant had a good and meritorious defense to all of the plaintiff's claim in that he, the defendant, "never promised to pay Anna Tyrak nineteen hundred dollars (\$1900.00) and as a further defense that at the time of the alleged bill of sale set forth in the declaration, "the plaintiff was not possessed of the title to the chattels" which he sold to defendant.

It is at once apparent that this did not set forth a meritorious defense. Plaintiff's declaration did not allege any promise by defendant to pay Anna Tyrak, but a promise to pay the plaintiff, and the amount which plaintiff alleged defendant promised to pay him was \$1800 and not \$1900, as is stated in the affidavit. The assertion that at the time of the sale plaintiff was not possessed of title to the property is not important, for it is not alleged that he had title, and with reference to the growing crops and other farm products the declaration specifically alleged that plaintiff had "an interest" therein, which was sold to defendant. Furthermore, even if it be conceded that plaintiff

[illegible]

did not have title, the affidavit asserts no damages or loss resulting to the defendant for this reason.

The affidavit of defense failed to show that defendant had a good and meritorious defense to all of plaintiff's claim, and because of this failure the trial court was justified in denying the motion to vacate the judgment. There was no error on the part of the trial court, and the judgment is affirmed.

AFFIRMED.

Hatchett, F. J., and Johnston, J., concur.

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709

SAMUEL E. SPRINGER, Doing Business
as Continental Lace Curtain Mills,
Appellee,

vs.

H. BYSTER, Doing Business as
Byster Bros.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 603

MR. JUSTICE MCBURLEY DELIVERED THE OPINION OF THE COURT.

This appeal questions the order of the Superior court over-ruling defendant's motion to vacate a judgment for \$7196.21 entered against him by confession under power of attorney, in three judgment notes.

The motion was supported by defendant's affidavit, which in substance asserts that plaintiff held certain judgment notes made by defendant and in July, 1925, when defendant contemplated making a building loan on real estate owned by him, he ascertained that plaintiff had taken judgment against him on these notes; he went at once to plaintiff to ascertain why this was done and to obtain a release and satisfaction of record. The affidavit proceeds:

"Plaintiff was not in the city and affiant was sent to the office of Samuel C. Horwich, attorney for plaintiff, who telegraphed to plaintiff the demand of affiant to satisfy said judgment. Plaintiff sent a release and satisfaction of such judgment to his attorney, but directed his attorney not to deliver said satisfaction piece to affiant until affiant had given notes in the sum of \$6,800, which was the balance then shown on the books of plaintiff and claimed to be due by plaintiff from affiant. Affiant informed the attorney that he did not owe the plaintiff that amount, and it was doubtful if he owed anything, but as it was imperative that affiant secure a satisfaction and release of said judgment, and as the only way he could get it was by executing the notes here sued on, affiant made a proposition to Samuel C. Horwich, attorney for plaintiff, that affiant would execute the notes aggregating \$6,800 and place them with said Samuel C. Horwich in escrow, conditioned upon said Samuel C. Horwich holding said notes and not delivering said notes to plaintiff until the accounts in dispute between plaintiff and defendant were settled and adjusted, and if at that time it was found that there was anything due plaintiff, new notes

WIS. - NORTH

BARBARA A. HARRIS, Clerk of Court, County of Lincoln, Wis.

STATE OF WISCONSIN
COUNTY OF LINCOLN

I, Clerk of Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of Lincoln, Wisconsin.

241.1.108

MR. JUSTICE ROBERTSON, CHIEF JUSTICE OF THE SUPREME COURT

This report questions the order of the Supreme Court

overruling defendant's motion to vacate a judgment for \$7500.00

entered against him by defendant's attorney, in 1935

judgment entered.

The motion was supported by defendant's affidavit,

which in substance asserts that plaintiff held certain judgment

notes made by defendant and in July, 1935, when defendant confessed

to making a banking loan on such notes owned by him, he acknowledged

that plaintiff had taken judgment against him on these notes; he

went at once to plaintiff to ascertain why this was done and to ob-

tain a release and satisfaction of notes. The affidavit proceeds:

"Plaintiff was not in the city and plaintiff was sent to the

attorney at Madison, Wisconsin, attorney for plaintiff, who there-

upon advised plaintiff the amount of plaintiff's liability was

\$7500.00. Plaintiff sent a release and satisfaction of such

judgment to his attorney, but directed his attorney not to

release said notes until plaintiff had paid him \$7500.00, which was the balance then

due on the notes of plaintiff and claimed to be due by him.

"Plaintiff returned the attorney that he did

not owe the plaintiff that amount, and it was doubtful if he

would pay anything, but as it was imperative that plaintiff receive a

were to be executed by affiant, and those held by Samuel C. Horwich returned to affiant. This proposition was accepted by Samuel C. Horwich and this affiant then and there executed the notes and placed them in the custody of Samuel C. Horwich upon the distinct promise and contract that the same were to be held in escrow until affiant's accounts with the plaintiff were settled and adjusted, which was to be done immediately upon plaintiff's return to the city; that the notes were never delivered to plaintiff by affiant and that the delivery of the notes to plaintiff by Samuel C. Horwich was in plain violation of the contract and agreement of the affiant and was unauthorized and contrary to law."

It will be noted that plaintiff had sent a release and satisfaction of his judgment to his attorney with directions not to deliver such satisfaction piece to the defendant until the defendant had given the notes in question; and yet knowing that the attorney's authority was thus limited and defined, defendant made a different agreement with the attorney, namely, that his notes should be held by the attorney "in escrow," not to be delivered to plaintiff until the accounts in dispute between them had been settled, and pursuant to this the defendant received the satisfaction piece and release of the prior judgment.

It is a well established rule that one who deals with an attorney and knows the limitation of his authority is bound thereby and cannot rely on any act of the attorney which he knows is beyond the scope of this authority. Lochenmeyer v. Fogarty, 112 Ill., 572; Danziger v. Pittsfield Shoe Co., 204 Ill. 145; McClintock v. Helberg, 168 Ill. 384; Meachem on Agency, 2nd ed., vol. 2, par. 2163.

A motion to vacate a judgment must be based on equitable considerations. It would be far from equitable to permit the defendant to maintain his motion upon the ground that he secured the release from plaintiff's attorney by persuading the attorney to give it to him on conditions contrary to the directions of plaintiff.

The foregoing reason is sufficient to affirm the order of the court, and it is unnecessary for us to discuss the cases

distinguishing the effect of Sec. 16 of the Negotiable Instruments Act, which provides that under certain circumstances "the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument."

Nowhere in the affidavit does defendant allege that he does not owe plaintiff the amount of money for which the judgment was entered. Neither does he offer to restore the plaintiff to the condition he was in before delivering the release and satisfaction of the prior judgment. It would not be fair to permit defendant to retain the advantage and consideration he received for delivering this notes and at the same time relieve him from obligation thereunder.

For the reasons above stated, we hold that the order of the trial Judge was proper and it is affirmed.

AFFIRMED.

Katchett, F. J., and Johnston, J., concur.

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HARRY FREIFELD,
Appellee,

vs.

HYMAN EHRENBERG, CHARLES
CHESLER, SIMON GORELICK
and HARRY GOLDSTEIN,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 603

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

The brief of the defendants filed herein suggests that if attorneys would read and follow carefully our Rule 19 it would be of great assistance to the court.

We gather, however, that this was a suit for damages for an alleged breach of contract, whereby plaintiff agreed to sell and defendants to buy certain real estate in Chicago. Five hundred dollars was paid by the defendants as earnest money, and defendants filed a claim of set-off for this. Upon trial by the court plaintiff had judgment for \$500.

The case was tried somewhat informally and there were numerous errors with reference to the rulings on the admissibility of testimony. We are of the opinion that the judgment entered cannot stand, and as the case was tried by the court, proper judgment will be entered here.

Sometime before the signing of the contract the defendants gave Louis Hyman and B. Stepansky, real estate brokers in Chicago, \$500 as a deposit on the purchase of the property in question, and their undated receipt ^{therefor} contained the condition that if the buyers could not secure a building loan for \$65,000 within thirty days, they would receive the deposit back. Subsequently, although how long after is indefinite, the contract in question was executed, which recites that \$500 has been paid as earnest money

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ALBANY, NEW YORK, SATURDAY
MAY 15, 1896.
SIR: I have the honor to acknowledge
the receipt of your letter of the 14th inst.

BOOKS

THE BOARD OF THE UNIVERSITY OF THE STATE OF NEW YORK
IN SENATE, JANUARY 12, 1909.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference.

It is the opinion of the court that the judgment entered against the defendant is proper and should be affirmed.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the purpose of subverting the Government of the United States.

and that should the purchasers fail to perform the contract at the time and manner therein specified the earnest money should be retained by the vendor as liquidated damages.

Plaintiff asserts that the purchasers failed to carry out the contract and that he is entitled to retain not only the \$500 as damages, but also in addition to recover whatever he has been damaged. He introduced evidence attempting to show that within a short time after the contract was made at the purchase price of \$3500, the value of the property declined to \$7,000. The defense was that the conditions in the receipt given by the real estate brokers were part of the contract, and as the purchasers were not able to secure a building loan for \$65,000, the whole deal was off and they were entitled to receive back the \$500 earnest money.

The answer to plaintiff's claim is that it was agreed by the parties by the terms of the contract that the \$500 was to be retained as liquidated damages and, while it is true that under certain circumstances this does not always measure the amount of damages, yet plaintiff failed sufficiently to prove that he suffered any additional damages. The testimony of the depreciation of the premises within a few weeks after the contract failed so completely that it cannot be considered as proof. It also appears that plaintiff did not own the property and his interest therein is somewhat indefinite, so that it cannot be said with any degree of certainty that he suffered any actual damage.

As to the defendants' claim with regard to the effect of the receipt of the real estate brokers, it is sufficient to say that its terms and conditions became merged into the contract of the parties, and in that contract the sale is not conditioned upon any building loan to be procured by the purchasers. The contract is definite and specific that the \$500 earnest money is to be retained by plaintiff if the purchasers fail to consummate the sale

and then during the purchase failed to perform the contract as the time and manner therein specified the money should be retained by the vendor as liquidated damages.

It is also alleged that the purchaser failed to carry out the contract and that he is entitled to retain not only the

\$200 as damages, but also in addition to recover whatever he has been damaged. He introduced evidence attempting to show that with

in a short time after the contract was made as the purchase price of \$200, the value of the property declined to \$7,000. The defense

was that the conditions in the receipt given by the real estate brokers were part of the contract, and as the purchasers were not

able to secure a building loan for \$25,000, the whole deal was off and they were entitled to receive back the \$200 earnest money.

The answer to plaintiff's claim is that it was agreed by the parties by the terms of the contract that the \$200 was to be retained as liquidated damages and, while it is true that when

certain circumstances arise this sum may be used as a part of the damages, yet plaintiff failed sufficiently to prove that he was

owed any additional damages. The testimony of the deposition of the witness shows a few words to the effect that he

believed that it would be sufficient to show, it was agreed that plaintiff did not see the property and the interest therein

is retained as liquidated damages, it is not sufficient to show that the property was not returned and that the contract

is retained as liquidated damages.

As to the defendant's claim that he was in the contract by the terms of the contract, it is sufficient to say

that the contract was not carried into the contract of the parties, and as that contract the rule is not conditioned upon

any condition as to the return of the property. The contract is not carried into effect in that the contract was not

according to the terms of the contract. This provision is inconsistent with and must prevail over the conditions contained in the receipt.

There is some discussion as to which of the parties was first in default, but there is sufficient evidence to justify the conclusion that the failure to consummate the sale was occasioned by the inability of the defendants to carry it through.

The finding of the trial court against the defendants' set-off was proper, but we cannot agree that plaintiff is entitled to judgment. He has the \$500 earnest money retained as liquidated damages, which is all he is entitled to.

The judgment is reversed and judgment of nill capiat will be entered here.

REVERSED, AND JUDGMENT OF NILL CAPIAT.

Wachett, P. J., and Johnston, J., concur.

submitted to the Board of the University. This provision is made
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349 - 30611

ALBERT FORAY,
Appellee,

vs.

ALFRED VALLEN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 604

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff and defendant while driving their respective automobiles collided at a street intersection. Plaintiff brought suit, alleging that defendant's negligence caused the accident with ensuing damages to his automobile, and on trial before a jury had a verdict for \$266.58. From the judgment thereon defendant appeals.

The collision occurred at the intersection of Brandon avenue and Brainard avenue, in Chicago. Brandon runs north and south and Brainard crosses it diagonally, running northwesterly and southeasterly. The evidence tended to show that on December 24, 1924, at 2:30 p. m., plaintiff was driving his car south on Brandon avenue at about ten or twelve miles an hour. Upon reaching Brainard he brought his car to a stop and saw defendant's automobile approaching on Brainard from the east. It was then about four hundred feet away. Plaintiff started his car to swing east into Brainard avenue, but when he reached the center line of Brainard defendant's car approached at a speed of more than twenty miles an hour. When about twenty feet away from plaintiff's car defendant's car went over to the south side of Brainard avenue, striking plaintiff's car. Plaintiff testified that defendant was intoxicated at the time. Another witness testified that defendant's car was traveling along Brainard at the rate of forty miles an hour, and that it never slackened as it approached the intersection. Defendant testified that when he saw plaintiff's car it was twenty feet from Brainard avenue, at

which time he was thirty or forty feet from Brandon avenue; that on seeing plaintiff's car entering Brainard avenue he applied the brakes on his machine, but it skidded and struck plaintiff's car; and that the road was a sheet of ice.

Whether the accident was caused solely by the negligence of defendant was for the jury to determine, and upon the record we cannot say that their conclusion was not justified.

Furthermore, by virtue of the statute, plaintiff was entitled to the right of way over defendant's car. Chapter 95-A, sec. 33, Motor Vehicle Law, Illinois Statutes (Cahill): Partridge v. Eberstein, 225 Ill. App. 209; Januchowski v. Stanoff, No. 29570, opinion filed in this court April 13, 1925.

The case was fairly tried and the judgment must stand.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

which time he was driving on Forty-fourth Avenue; that on
seeing plaintiff's car entering defendant's avenue he applied the
brakes on his machine, but it skidded and struck plaintiff's car;
and that the road was a street of law.

Whereas the accident was caused solely by the negli-
gence of defendant and for the injury to defendant, and upon the

facts of the case the jury find that defendant is liable for the
injury to plaintiff, and that the amount of the damages is
\$10,000.00, and that the plaintiff is entitled to interest thereon
from the date of the accident to the date of the verdict, and
that the plaintiff is entitled to costs of suit.

And the jury return the following verdict:

Verdict: That the defendant is liable for the injury to the plaintiff,
and that the amount of the damages is \$10,000.00, and that the
plaintiff is entitled to interest thereon from the date of the
accident to the date of the verdict, and that the plaintiff is
entitled to costs of suit.

399 - 30681

GIZELLA SZIRWAY, Administratrix
of the Estate of Beatrice Szirway,
Deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO
CITY RAILWAY COMPANY, CALUMET &
SOUTH CHICAGO RAILWAY COMPANY, and
the SOUTHERN STREET RAILWAY COMPANY,
Corporations Operating on CHICAGO
SURFACE LINES,

Appellants.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

241 I.A. 604

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Beatrice E. Szirway, then slightly over nineteen years of age, on the morning of March 30, 1923, while crossing from the east to the west side of Clark street, at the intersection of Winnemac avenue, in Chicago, was struck by a south bound street car of the defendants and so injured that she died. Her administratrix brought suit to recover damages and upon trial by a jury had a verdict and judgment for \$1500. Defendants contend that there should be a reversal for the reason that the verdict is contrary to the preponderance of the evidence.

The sole issue is one of fact. Clark street runs north and south and Winnemac avenue intersects it, running east and west. The intersection is not straight, for Winnemac running east from Clark is south of the street running west from Clark by about the width of Winnemac avenue; that is, the south line of Winnemac avenue west of Clark is about opposite the north line of Winnemac avenue east of Clark street.

Plaintiff's version is that while the intestate was crossing Clark street from east to west in the south line of easterly Winnemac avenue, a south-bound street car with trailer *attached slack* attached slack and applied the brakes at the north line of

westerly Winnebago avenue as if to take on some persons standing there, but instead of stopping proceeded at a speed of about twenty-five miles an hour across the intersection; that there was a high wind at the time which caused plaintiff's intestate to bend her head, and she continued across Clark until struck by the street car.

It very rarely, if ever, happens that the facts in any one case of this kind are in every respect exactly like those in any other case. The general principles are well known and the decisions in reported cases are of little value to a reviewing court in determining whether or not the evidence justifies the verdict.

This case is peculiarly close on the facts. The jury evidently concluded that the motorman was negligent in so operating the car as to lead nearby persons to believe that it was about to stop and then, without stopping, proceeding at full speed across the intersection, regardless of the intestate.

Whether or not the plaintiff's intestate was guilty of contributory negligence was also for the jury to determine. The movements of the car, and the wind causing the intestate to bend her head thus interfering with her constant view of the car, evidently influenced the jury to acquit her of contributory negligence.

We are not called upon to express our conclusions as if we were sitting as jurors. We are to determine only whether or not the verdict is manifestly against the weight of the evidence, and unless we can so conclude we will not disturb the judgment. Under all the circumstances of the case, we have not been able to arrive at an opinion that the record demands a reversal, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

414 - 30677

MARY KELLY et al.,
Appellees,

vs.

CHARLES E. ERBSTEIN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 604

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Mary Kelly filed a bill of complaint praying for the cancellation of a trust deed and removing of the same as a cloud upon the title of the property covered by it. By amendment her brother, James Thomas Kelly, was made a party complainant, and after several further amendments to the bill the defendants Charles P. R. Macaulay and Payton J. Tuohy, trustee, answered, and the defendant Charles E. Erbstein not appearing was defaulted. A decree was had removing the lien of the trust deed as a cloud on the title and directing that Tuohy as trustee execute a release of said trust deed, and upon his failure to do so that a master in chancery execute such release. From this decree defendants appeal.

The bill of complaint alleges that in November, 1915, Mary Kelly, being the owner in fee simple of certain real estate in Cook County, Illinois, was made defendant in a bill filed in the Superior court by James Thomas Kelly, who alleged that Mary Kelly held only the naked legal title in trust for certain persons. November 30, 1915, she retained Erbstein and Macaulay, attorneys, to represent her in said suit, and gave them, in consideration of the services to be performed, a judgment note for \$1,000, payable to her own order and endorsed by her, and a trust deed securing the note conveying the real estate in question. Erbstein and Macaulay failed to represent her and allowed a decree pro confesso

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241 I.A. 604

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to be entered against her. She was thereby forced to employ other attorneys to take the case to the Supreme court and conduct the litigation to a conclusion. December 3, 1920, Macaulay obtained a judgment for \$1275 by confession on said note in the Circuit court. This judgment Mary Kelly had re-opened on January 13, 1921, and obtained leave to file her plea, wherein she alleged the employment of Erbstein and Macaulay as her attorneys in the Superior court proceedings, their failure to represent her, and that the consideration for the note had failed. On trial by jury on November 18, 1922, the judgment by confession was vacated and judgment in favor of Mary Kelly entered, which remains in full force.

Defendants assert that Mary Kelly was indebted to them for services rendered; this has no support in the record, but as the claim was adjudicated in the law suit in the Circuit court it is immaterial now.

It is also contended that complainants did not tender to the trustee his charges when demand for release of the trust deed was made. This point was not raised by answer and cannot be raised for the first time in this court.

The sole question to be determined is: Where the debt, as evidenced by the note of Mary Kelly, has been extinguished by judgment, does the lien of the trust deed given to secure said debt remain unextinguished?

It is a long established rule that the debt is the principal thing, and the mortgage is but the incident. Harris v. Mills, 28 Ill., 44; Pollock v. Naison, 41 Ill. 516; McMillan v. McCormick, 117 Ill., 79; Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366.

The record shows that the note was extinguished by judgment of the Circuit court, which effectually bars the lien of the trust deed. The decree of the Chancellor ordering a release of the trust deed was correct and is therefore affirmed.

AFFIRMED.

Ketchett, P.J., and Johnston, J., concur.

GEORGE E. O'DONNELL, Doing
Business as GEORGE E. O'DONNELL
& COMPANY,

Appellee,

vs.

ARTHUR LONCHURST and EMMA
FRANCES LONCHURST,

Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 604

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

November 6, 1923, the residence of the defendants in Berwyn, Cook county, Illinois, was damaged by fire. The loss was covered by policies in the Hartford Fire Insurance Company. Plaintiff, a contractor, was employed to repair the damages. After the work was done he failed to receive payment and brought suit against defendants, and upon trial had a verdict for \$1531.70 with interest, on which judgment was entered for \$1645.08, from which defendants appeal.

By his declaration plaintiff alleged a contract with defendants to furnish the necessary labor and materials for repairs for \$1635.50, and by another count that the labor and materials were reasonably worth that amount, which defendants promised to pay. The declaration also contained the common counts. The defense was that the labor and materials were furnished not at the request of defendants but at the request of the Hartford Fire Insurance Company; that the labor and materials were not of the value alleged by plaintiff in his declaration, and that the work was ^{not} done in a workmanlike manner and the materials were inferior in quality.

Was the verdict manifestly against the weight of the evidence? Touching the question as to who ordered plaintiff to do the work, it was shown that after the fire Paul T. Bolton, an adjuster for the Hartford Fire Insurance Company, called at the home

402 A. E. Ellis

Journal of Management Education 35(10) 1039-1054

On October 8, 1960, the vestiment of the defendant in
the case was damaged by fire. The loss was

[illegible]

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket of the car's interior. I looked around, trying to get my bearings. The street was empty, the only sound being the distant hum of traffic. I felt a sense of isolation, a feeling that I was alone in a vast, unfamiliar world. I took a deep breath, trying to steady myself. The air was crisp, almost invigorating. I knew I had to keep going, no matter how difficult it might be. I started walking, my feet hitting the cold pavement. Each step felt like a challenge, a test of my resolve. I didn't know where I was going, but I knew I had to go somewhere. The cold was a constant reminder of my situation, a reminder that I was on my own. I pushed forward, my determination growing with each step. The world around me was a blur, but I knew I was moving. I was taking control of my destiny, one step at a time.

of defendants to make an estimate of the fire loss; that he there met defendant Arthur Longhurst, and informed him that it would be necessary for him to furnish the company with an itemized statement of the loss. Longhurst replied that he knew nothing of such matters, and Bolton suggested the names of several contractors who made a specialty of repairing such damage, plaintiff's name being one of these. Bolton, at the request of Longhurst, left a message by telephone at plaintiff's office for him to call upon Longhurst. Afterwards, plaintiff visited the defendants' residence and made an estimate of what it would cost to make repairs. After some negotiations, the loss was placed at \$1610.90 and Longhurst signed the proofs of loss prepared by Bolton for the insurance company. There is contrariety of evidence as to who ordered the work done. Bolton, who was representing the insurance company, testified that the insurance company did not elect to do the work and gave no orders to plaintiff; that Longhurst informed him that he had retained the plaintiff to do the work. O'Donnell testifies to the same effect. He says that he went through the building with both defendants and took memoranda as to the damage in each room and subsequently was told by Longhurst that this was satisfactory to him and to "go ahead." This is denied by Longhurst.

The plaintiff and other witnesses testified in detail as to the labor performed and the materials furnished and that the material was of good quality and the work was workmanlike. Two experts testified on behalf of the defendants in great detail, giving their opinions to the contrary as to the quality of the work and materials, and defendants testified that the work was poor.

Plaintiff's evidence tended to prove that the contract price agreed upon was \$1610.90 and that this was the fair reasonable market price for the repairs. It was also shown that in the proof of claim for loss filed by defendants with the insurance

of defendant to make an estimate of the time lost; that he
there not defendant further defendant, and informant that it
would be necessary for him to furnish the company with an
itemized statement of the loss. Defendant replied that he
knew nothing of such matters, and Holton suggested the names
of several contractors who made a specialty of repairing such
damage, defendant's name being one of these. Holton, at the
request of defendant, sent a message by telephone to defendant's
office for him to call upon defendant. Defendant, plaintiff
visited the defendant's residence and made an estimate of the
loss and sent to make repairs. After some negotiations, the loss
was placed at \$100.00 and defendant signed the check of loss
prepared by Holton for the insurance company. There is controversy
of evidence as to who ordered the work done. Holton, who was
representing the insurance company, testified that the insurance
company did not direct to do the work and gave no order to plain-
tiff; that defendant informed him that he had retained the plaintiff
to do the work. Defendant testified to the same effect. He says
that he went through the building with both defendant and took
inventory as to the damage in each room and subsequently was told by
defendant that this was satisfactory to him and to "the owner." This
is stated by defendant.

The plaintiff and other witnesses testified in detail as
to the extent and the materials furnished and that the
material was of good quality and the work was satisfactory. The
witnesses testified on behalf of the defendant in great detail, stating
that defendant as the owner of the building was the one who
ordered the work done and that the work was done.
Defendant's witness testified to facts that the defendant
never knew the defendant. It was also shown that in the
trial of this case the jury was instructed that the

company the damages were placed at this figure and that defendants agreed to accept this in full payment.

The court properly submitted these questions of fact to the jury, which found for plaintiff. This conclusion will not be set aside unless we can say it is manifestly against the weight of the evidence. The jury had an opportunity superior to ours to pass upon the credibility of the witnesses and to determine the weight to be given to their testimony. Upon the written record before us, we cannot say that the verdict was improper and certainly we cannot hold that it is manifestly contrary to the weight of the evidence.

Defendants attempted to show by the opinion evidence of two expert witnesses that the value of the work was less than plaintiff claimed, but objections thereto were sustained. It was virtually not controverted that plaintiff made the repairs and did the work shown in his estimate first made and his invoice subsequently sent to defendants. This shows in detail the work done and it would have been proper to have had qualified witnesses give their opinion as to the fair and reasonable value of this work; but defendants did not offer to do this, but sought the opinion of witnesses as to the value of work based upon the witnesses opinion of what work was done, based upon an inspection made several months after the work was completed. Their opinion, therefore, as to values was not as to the work actually done by plaintiff, but upon the conclusions of the witnesses as to what was done. These conclusions did not coincide with the undisputed testimony as to what plaintiff actually did. For instance, plaintiff's invoice shows in detail work done in the dining room. The memorandum of an expert witness, introduced for identification, omits any reference to the dining room. This opinion evidence as to values should have been based upon the facts shown by the evidence and not rest upon the mere opinion of the witnesses as to the facts. The objections were

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properly sustained.

It was not reversible error to exclude two photographs, taken some months later, of certain places where the plaster had peeled off. There was no dispute as to the existence of these places. Plaintiff himself testified as to this and said that he had offered defendants to put these places in good condition. The photographs would have added nothing to the admitted facts. Furthermore, the verdict was for something less than the contract price, and it is a fair inference that the jury deducted something on account of this imperfect plastering.

Under cross examination Arthur Longhurst testified that he had an arrangement with the Hartford Fire Insurance Company guaranteeing him against any loss resulting from this suit. As a general rule, especially in personal injury cases, it is reversible error to inform the jury that the defendant is insured against loss. However, in this case it was impossible to keep out the interest of the Hartford Fire Insurance Company in the suit. Defendants themselves presented the defense that plaintiff's contract was with the insurance company. The company's adjuster, Bolton, properly testified as to the damages and the agreement of the insurance company as to the amount of the loss. This established the fact that defendants' policies in the insurance company protected them against loss, so that the testimony of Longhurst really told nothing in this connection which did not already appear from the evidence. Under the circumstances, there was no harmful error in receiving his statement.

Although the rulings of the court upon instructions are argued at great length, we find nothing therein so prejudicial as to require a reversal. Taken as a series, they fairly instruct the jury as to the law applicable to the issues.

There is extended complaint of the conduct and remarks of the court in the presence of the jury during the progress of

properly explained.

It was not surprising to exclude the photographs taken some months later, at certain places where the plaster had peeled off. There was no sign as to the extent of these places. Plaintiff himself testified as to this and said that he had offered defendants to put these places in good condition, the photographs would have shown nothing to the contrary. Furthermore, the verdict was for something less than the contract price, and it is a fair inference that the jury accepted something on account of this imperfect plastering.

Under cross examination at New Hampshire testified that he had an arrangement with the Hartford Fire Insurance Company guaranteeing him against any loss resulting from this suit. A general rule, especially in personal injury cases, it is not usual to allow a party to introduce the fact that the defendant is insured against loss. However, in this case it was impossible to keep out the testimony of the Hartford Fire Insurance Company in the suit. Defendants themselves presented the defense that plaintiff's contract was with the insurance company. The company's adjuster, Nelson, properly testified as to the damages and the agreement of the insurance company as to the amount of the loss. This evidence linked the fact that defendants' witness in the insurance company testified them against loss, so that the testimony of defendants really told nothing in this connection which did not already appear from the evidence. Under the circumstances, there was no material error in receiving his testimony. Although the rulings of the court upon questions are correct it must be said that the court should have permitted to be received a verdict. Taken as a whole, they fairly reflect the jury as to the law applicable to the issues. There is extended complaint of the conduct and testimony of one party in the presence of the jury during the progress of

the trial. The trial judge was apparently somewhat impatient with the unnecessary length of time consumed to try the case. Such impatience may be excusable, but even under the most trying circumstances presiding judges should, and indeed very rarely fail to, refrain from comments calculated to influence the jury improperly against one side or the other. We have examined with care the alleged prejudicial remarks of the court and, while we cannot approve of everything said, yet there is nothing so important as to lead us to the conclusion that the defendants did not have a fair trial. Much of what was said by the court was induced by the apparent disposition of the attorney for defendants to engage the court in colloquy and argument. This case should not have taken three or four days for trial, and suggestions of the court tending to shorten the time will not be discouraged.

Other points are made criticising rulings upon the trial, but they are without substantial merit.

The verdict was amply justified by the evidence and as the errors upon the trial were not of a character to require a reversal, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

the trial. The trial judge was apparently somewhat impatient
with the unnecessary length of the comments on the case.
Such impositions may be excusable, but even under the most
trying circumstances providing judges should, and indeed very
rarely fail to, refrain from comments calculated to influence
the jury improperly against one side or the other. We have
examined with care the alleged prejudicial remarks of the court
and, while we cannot approve of everything said, yet there is
nothing so important as to lead us to the conclusion that the
defendants did not have a fair trial. Much of what was said by
the court was indeed by the apparent disposition of the
attorney for defendants to engage the court in colloquy and
argument. This was clearly not done with any view to
the trial, and suggestions of the court tending to shorten the
trial will not be disregarded.
Other points are made regarding rulings upon the
trial, but they are without substantial merit.
The verdict was amply justified by the evidence and
the errors upon the trial were not of a character to require
a reversal, the judgment is affirmed.
AFFIRMED.
J. L. and Johnson, J. J. concur.

37 - 30279

COURTENAY BARBER,

Defendant in Error,

v.

GENERAL AUTOMOTIVE CORPORATION,
a corp.,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

241 I.A. 604

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

By this writ of error the defendant corporation seeks to reverse a judgment for \$5,087.50, recovered against it by the plaintiff Barber in the Municipal Court of Chicago. The issues were submitted to a jury and the judgment followed a verdict for the plaintiff. Barber brought this action to recover the balance he claimed to be due on a promissory note, executed by the defendant under date of February 5, 1924, and due on August 1, 1924, to the order of "Harvey S. and Chas. A. Pardee" and endorsed by those two payees in blank. The plaintiff testified that he received the note from the Pardees on the day before it was due, - July 31, 1924; that they were indebted to him to the extent of approximately \$12,000, for money he had advanced to pay insurance premiums the Pardees owed; and that the note sued upon was given to him as "additional collateral" to the notes of the Pardees, representing that indebtedness to the plaintiff. The plaintiff later received payments on the note from the defendant, reducing it to the amount recovered in this suit.

241 I.A. 604

Opinion filed March 10, 1938.

By this writ of error the defendant corporation
seeks to reverse a judgment for \$8,087.00, recovered against
it by the plaintiff under the contract of sale.
The issue was submitted to a jury and the plaintiff
a verdict for the plaintiff. The defendant
seeks to reverse the verdict by claiming to be on a preliminary
issue, stated in the defendant's motion at Chicago, Ill.,
that the contract was void, as the price of \$8,087.00
was not a cash price, and was subject to change in value
from time to time. The defendant also claims that the contract
was void as the cash price was not a cash price, and was
subject to change in value from time to time. The defendant
also claims that the contract was void as the cash price
was not a cash price, and was subject to change in value
from time to time. The defendant also claims that the
contract was void as the cash price was not a cash price,
and was subject to change in value from time to time.

In further explanation of the circumstances under which he took the note in suit, the plaintiff testified that he had advanced approximately \$12,000 for premiums due on policies of insurance on the lives of Harvey S. Fardee and Charles A. Fardee, issued by the company of which the plaintiff was the general agent in Chicago; and that the Fardees owed him that money, and he wanted to secure that debt with additional collateral, "and that is why that note was turned over to me. * * * I accepted the General Automotive Corporation note as collateral to insure the payment of their obligation."

In the course of the cross-examination of the plaintiff by counsel for the defendant, he was asked what subsequently became of the notes of the Fardees which he held and on which he took the note in suit as additional collateral, and he answered that they were "subsequently returned to the Fardees, as liquidated." He was then asked what the consideration was for the giving up of these Fardee notes by him, and he answered: "The consideration for the giving up of those notes was the transfer of certain property * * * the Highland Park property, * * * which was deeded to me;" that these Fardee notes which he held constituted the consideration for that deed. In other words, he testified that after the Fardees gave him their notes for the money he paid out for them in meeting their insurance premiums, they took up those notes, not by paying Barber their amount in cash but by conveying certain Highland Park real estate to him.

The further explanation of the circumstances under which he took the note in suit, the witness testified that he had advanced approximately \$12,000 for premiums due on policies of insurance on the lives of Harry E. Tardos and Charles A. Tardos, issued by the company of which the witness was the general agent in Chicago; and that the witness owed him that money, and he wanted to secure that debt with additional collateral, "and that is why that note was turned over to me." * * * accepted the General Insurance Corporation note as collateral to insure the payment of their obligation.

In the course of the cross-examination of the witness by counsel for the defendant, he was asked what subsequently became of the note. The witness who he said and on which he took the note in suit as additional collateral, and he answered that they were subsequently returned to the Tardos, as indicated. He was then asked what the consideration was for the giving up of these Tardos notes by him, and he answered: "The consideration for the giving up of those notes was the return of certain property." * * * the defendant took property which was deemed to be: that those Tardos notes which he had furnished the consideration for that debt. In other words, he testified that after the Tardos gave him their notes he was to give back to them in meeting their insurance premium, they said on their notes, and in paying interest with a view to pay for carrying certain obligations back to him.

We are this day handing down opinions in two other cases - #30413 and #30843 - between the same parties, on two other notes executed by the defendant and held by the plaintiff. Although separate abstracts have been filed in each of these three cases, a motion to consolidate the cases for hearing was allowed, and the respective parties have filed consolidated briefs covering all three cases, in which references are made promiscuously to the evidence contained in each of the three records. However, we may not consider, in the decision of any one of these cases, any facts not shown by the evidence presented in that case.

It appears from the evidence preserved in the record of this case that after the plaintiff received the note in suit from the Pardees, as collateral security for their notes already held by him, the notes of the Pardees were liquidated and taken up by them, by means of the transfer of certain real estate from them to Barber. There is nothing in this record, showing or tending to show, that Barber held the note in suit by any claim except as collateral to the Pardee notes. It does not appear from the evidence in this record whether the Pardee notes were liquidated before or after this case was instituted by Barber. The evidence that was brought out in the other cases between these parties, referred to above, being to the effect that the Pardee notes, which were held by Barber, were liquidated after the institution of the case at bar, the defendant calls our attention to a sentence in 31 Cyc. 832, to the effect that "if, after the filing of a suit by the pledgee against the maker, he is paid the amount of his debt and costs of the

and the fact that the parties in the other
cases - Smith and Thomas - between the same parties, on the
other notes executed by the defendant and held by the plain-
tiff, although separate statements have been filed in each
of those cases, a motion to consolidate the cases for
hearing was allowed, and the respective parties have filed
consolidated briefs covering all three cases, in which the
facts are set forth and the evidence contained in
each of the three cases, however, is not considered
in the motion, as any one of these cases, any issue not
raised by the evidence presented in that case.

It appears from the evidence presented in the
motion of this case that after the plaintiff received the
note in suit from the defendant, an indorsement, security for
the note, was already held by him, the notes of the defendant
were identified and taken up by them, by means of the trans-
fer of certain real estate from them to Barker. There is
nothing in this record, showing or tending to show, that
Barker sold the note in suit by any other except an indorsement
to the record notes. It does not appear from the evidence
in this record whether the Barker notes were identified by
him as after this case was instituted by Barker. The
evidence that was brought out in the other cases between
these parties, referred to above, tending to the effect that the
Barker notes, which were held by Barker, were identified after
the institution of the case at bar, the defendant calls out
attention to a sentence in 21 Cyc. 522, to the effect that
"all other the filing of a bill by the plaintiff against the
defendant, he is held the amount of his debt and costs of the

suit, he is not entitled to further maintain the suit." The only case cited by the author in support of that proposition is Matthews v. Cantey, 48 S. C. 588. This case is also referred to by counsel for the defendant in their brief. That case was based upon a section of the South Carolina code, requiring that every action must be brought and "prosecuted" in the name of the real party in interest, except as otherwise provided in the code.

It was pointed out by this court in Gannon v. Huse 9 Ill. App. 557, that the rule affording full protection to a pledgee, taking negotiable paper as collateral security for a debt, and giving him the status of a holder in due course of such paper, only extends to the amount of the debt secured, "if, as between the original parties, there is a defense on the merits." It was held in Manning v. McClure, 36 Ill. 490, and Worcester National Bank v. Cheeney, 87 Ill. 608, that one taking commercial paper before its maturity, as security for a pre-existing debt, shall be deemed a holder for value and in due course, and therefore, not subject to defenses between the original parties, as to which the holder had no notice. But, as pointed out by Daniel in his work on Negotiable Instruments, article 832, "when it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures, if there be a valid defense against its transferor, being regarded as, at all

and, as it is not entitled to further review in the trial,
The only case cited by the author in support of that
proposition is Whitcomb v. Carter, 48 N. E. 2d 880. This
case is also referred to by counsel for the defendant
in their brief. That case was based upon a section of
the South Carolina code, regarding that every action
must be brought and prosecuted in the name of the
real party in interest, except as otherwise provided in
the code.

It was pointed out in this court in Whitcomb v. Carter, 211 S. W. 2d 537, that the rule extending full protection to a plaintiff, taking reasonable steps to protect himself against a debt, and giving him the right of a holder in due course of such paper, only extends to the amount of the debt received, "if, as between the original parties, there is a defense on the merits." It was held in Whitcomb v. Carter, 211 S. W. 2d 537, and Whitcomb v. Carter, 211 S. W. 2d 537, that the plaintiff's paper before the maturity, as against the defendant, shall be deemed a holder in due course, and in due course, and plaintiff is entitled to recover the full amount, as if there were no defense on the merits. But, as pointed out by counsel for the defendant, the rule in Whitcomb v. Carter, 211 S. W. 2d 537, is limited to the amount of the debt which was received by the plaintiff as original party to the debt, and he is entitled to recover the full amount of the debt which he received, as if there were no defense on the merits, being regarded as, as if

event, a bona fide holder, and entitled to stand upon a better footing, only pro tanto," citing cases. That was the ruling of this court in Gannon v. Huse, supra.

It follows that if there is a complete defense to the note sued upon, as between the original parties, namely, the defendant and the Pardees, the plaintiff, holding this note as collateral security, occupies the position of a holder in due course only to the extent of the debt due him from the Pardees, as represented by their notes to him; and if those notes have been liquidated and extinguished, as the evidence in this record shows to be the case, the plaintiff could then recover nothing on this note from the defendant maker. The question then is: Did the defendant have such a defense on this note as against the original payees, the Pardees?

It is the contention of the plaintiff that the defendant has not in its pleading interposed any defense on the note sued upon, either as against Barber or as against the Pardees. In its affidavit of merits the defendant alleges that at the time the Pardees endorsed and delivered the note to the plaintiff, the Pardees were, and they still are, indebted to the defendant for money illegally withdrawn by them in the guise of salary to an extent greatly in excess of the amount of the note. That, in our opinion, is sufficient, so far as the defendant's pleading is concerned and put the defendant in a position to show that it did have a defense as against the Pardees. But, the plaintiff further contends that no proper evidence appears in the record in support of that defense. On the other hand, in this connection

over, a very high holder, and entitled to stand upon a
better footing, only the plaintiff, being known. That was
the ruling of this court in Barber v. Barber.

It follows that if there is a complete set-
off to the same end upon, as between theoretical parties,
namely, the defendant and the Barbers, the plaintiff,
holding this note as collateral security, occupies the posi-
tion of a holder in due course only to the extent of the
debt due him from the Barbers, as represented by their
notes to him; and if those notes have been identified and
admitted, as the evidence in this case shows to be
the case, the plaintiff would then recover nothing on this
note from the defendant maker. The question then is: Did
the defendant have such a defense on this note as against
the plaintiff? The answer?

It is the contention of the plaintiff that the
defendant has not in the pleading introduced any defense on
the note and upon, at least as against either or as against
the Barbers. In the absence of such an affirmative defense
and as the law requires neither and forbids the other
as the plaintiff, the defense must, and will, be
grounded on the evidence the lawfully introduced by
him in the case of notice to an extent possibly in excess
of the amount of the note. That, in our opinion, is exactly
what he has done. He has introduced evidence to establish that he
the defendant is entitled to have that in the case of notice
as against the interest. Well, the plaintiff cannot
show on the evidence before him that he is entitled
to the defense. In the other hand, in this case, it

the defendant contends that proper evidence was offered on that issue, which the trial court erroneously excluded, on plaintiff's objection. It appears that on cross-examination of the plaintiff, counsel for the defendant asked him if it was not true that about the time of the making of the note sued upon, the two Pardees borrowed money on their life insurance from the plaintiff's company, because the defendant company was hard up. Plaintiff's objection to that question was sustained. Counsel for the defendant also asked the plaintiff whether he was not a close friend of the Pardees and conferred with them a great deal in regard to personal matters; and whether he didn't know that they were putting a great deal of money into their Highland Park property, - more than their salaries amounted to. Plaintiff's objections to those questions were also sustained. In our opinion, these rulings of the trial court are not open to criticism, both because the questions were not proper cross-examination and also because the subject-matter inquired^{about} was immaterial and would neither show nor tend to show the existence of any defenses on this note, as against the Pardees, or that the latter were indebted to the defendant company. It further appears that the defendant called a bookkeeper of the defendant company, as a witness, and asked her whether during the time of her employment by the defendant company, the Pardees had drawn money out of the company's treasury, in the way of salary or otherwise. Objections to questions along this line were also sustained, and counsel for the defendant then stated that he was seeking to make proof of the indebtedness existing from the Pardees to the company. The questions referred to, which appear in the record, were

the defendant contends that proper evidence was offered on that issue, which the trial court erroneously excluded. On plaintiff's objection, it appears that on cross-examination of the defendant, counsel for the defendant asked him if it was not true that about the time of the making of the note which upon, the two ladies borrowed money on their life insurance from the plaintiff's company, because the defendant company was dead up. Plaintiff's objection to that question was sustained. Counsel for the defendant also asked the plaintiff whether he was not a close friend of the defendant and conspired with him a great deal in regard to personal matters; and whether he didn't know that they were putting a great deal of money into their Highland Park property, more than their salaries amounted to. Plaintiff's objection to these questions were also sustained. In our opinion, these rulings of the trial court are not open to criticism, both because the questions were not proper cross-examination and also because the defendant's interest was established and would neither show nor tend to show the existence of any interest in this note, as against the interest, or that the interest was indebted to the defendant company. It further appears that the defendant called a witness of the defendant company, as a witness, and asked her whether during the time of her employment by the defendant company, the defendant had loaned money out of the company's treasury, in any way at all, or otherwise. Objections to this question were also sustained. Plaintiff's objection to this question was also sustained. It is not necessary to say more about the evidence offered by the defendant in this case, as the evidence is not material to the issue.

apparently preliminary,- and proper so far as they went. It is clear, however, that little, if anything, further could have been asked the witness, in seeking to prove the alleged indebtedness of the Pardees to the defendant, without the production of the defendant's books.

However, on this question of whether a defense existed on this note in suit, as against the Pardees, the plaintiff himself put in some evidence which, in our opinion is significant. He introduced a letter dated September 16, 1924, addressed to him and signed by the defendant company, which letter, he testified, he received about that date. It appears that the defendant had given the Pardees several notes and that the case at bar was brought to recover a balance claimed to be due on one of those notes. It also appears that the plaintiff held other notes which the defendant had given to the Pardees. In this letter the defendant made reference to a payment it had made on the note in suit, and then proceeded to say: "In regard to the other notes you hold - we do not intend to recognize them in your hands, because you are not the bona fide purchaser of these notes, nor are you the holder in due course. You were told plainly several weeks or months ago that the company has a set-off against the Pardees for money owed by them to the corporation, greatly in excess of the notes, together with other defenses. You took the notes with full knowledge and express notice of that fact, and, therefore, those defenses and set-offs are as good against you as against the Pardees." In our opinion that letter tends to show rather strongly that the defendant did have a good defense as against the Pardees, not only with

...and proper as far as they went.
It is clear, however, that little, if anything, further
could have been asked the witness, in coming before
the alleged involvement of the witness as the defendant,
without the production of the defendant's books.

However, on this question of whether a balance
existed on this note in suit, as against the defendant, the
plaintiff himself put in some evidence which, in our
opinion is significant. He introduced a letter dated
September 16, 1934, addressed to him and signed by the
defendant, which letter, he testified, he received
about that date. It appears that the defendant had given
the plaintiff several notes and that the case at bar was
brought to recover a balance claimed to be due on one of
these notes. It also appears that the plaintiff held
other notes which the defendant had given to the plaintiff.
In this letter the defendant made reference to a payment
it had made on the note in suit, and then proceeded to say:
"in regard to the other notes you hold - we do not intend
to recognize them in your hands, because you are not the
owner of these notes, nor are you the holder
of the books. You were told plainly several weeks or
months ago that we require a receipt against the
notes for money owed by them to the corporation. Plainly
in view of the notes, together with other balances. You
and the notes with full knowledge and express notice of that
fact, and therefore, these balances and notes are no good
against you as against the defendant. In our opinion you
ought to be held liable for the balance which was advanced to
you as a loan against the notes and other balances which you
were to receive in return for the notes and other balances."

respect to the other notes held by the plaintiff, but also in respect to the note here sued upon. If such is the fact and the defendant would not be liable upon this note at all, in an action brought upon it by the Pardees, then, in view of the fact that the evidence in this record shows without contradiction, and on the testimony of the plaintiff himself, that the notes given by the Pardees to the plaintiff had been liquidated and turned back to them, it would follow that the defendant could not be held liable on this note in this action, brought by Barber who held it as collateral security on the notes of the Pardees. For that reason, we are of the opinion that the evidence in this record is not such as to properly support the judgment appealed from.

The plaintiff has submitted motions in this case, one to strike the reply brief of the defendant and another to assess statutory damages against the defendant on the ground that the questions involved are such that the defendant and its counsel must have known that no real ground for reversing the judgment existed, and nevertheless sued out this writ of error, for the purpose only of delay. Both of these motions were reserved to the hearing and both of them are now denied.

For the reasons we have given, the judgment of the Municipal Court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views set forth in this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

...to the other notes held by the plaintiff, but also
in respect to the notes held by the defendant. It was in the
fact and the defendant would not be liable upon this note
at all, in an action brought upon it by the defendant, then,
in view of the fact that the evidence in this respect shows
without contradiction, and on the testimony of the plaintiff
himself, that the notes given by the defendant to the plaintiff
were had been liquidated and turned back to them, it would
follow that the defendant would not be held liable on this
note in this action, brought by the plaintiff who held it as col-
laterally security on the notes of the defendant. For that
reason, we are of the opinion that the evidence in this
respect is not such as to properly support the judgment

reversed here.

The plaintiff has submitted evidence in this
case, and to sustain the reply filed by the defendant and
another to sustain testimony brought against the defendant
on the ground that the questions involved are such that
all persons and the counsel must have been present
and present, the testimony of the defendant existed, and never-
theless, and this was of error, for the purpose only of
delay, and to delay the trial and to prevent the trial
from being held as soon as possible.

The evidence in this case, and the judgment of the
court, and the fact that the defendant is entitled to the
benefit of the doubt, and the fact that the plaintiff is
not entitled to the benefit of the doubt, and the fact that
the plaintiff is not entitled to the benefit of the doubt.

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PEOPLE OF THE STATE OF ILLINOIS,
ex rel MARY BARKDULL WEINER,

Plaintiff in Error,

v.

AGNES J. BARKDULL,

Defendant in Error.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

241 I.A. 605

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

The relatrix, Mary Barkdull Weiner, sued out a writ of habeas corpus in the Superior Court of Cook County, alleging that her daughter, Alice J. Barkdull, was illegally restrained of her liberty by Lucien H. Barkdull and the respondent, Agnes J. Barkdull. The writ was issued and served upon the respondent and she filed an answer to the petition of the relatrix, in which answer she set forth that her husband, Lucien H. Barkdull, had died less than a year prior to the filing of the petition and that Alice J. Barkdull was in her custody, as one of her adopted parents under a judgment and decree entered in the County Court of Cook County in 1912, - over ten years prior to the filing of the petition for the writ. A copy of the decree of adoption was attached to the respondent's answer. She further set forth in her answer that Alice J. Barkdull was about five weeks of age at the time of her adoption by the respondent and at the time of the filing of the answer she was nearly eleven years of age. The relatrix duly traversed the allegations set forth by the respondent in her answer. The issues

thus formed were presented to the trial court and after hearing all the evidence, the court found that the child, Alice J. Barkdull was lawfully detained by the respondent Agnes J. Barkdull, under a legal decree of adoption, and an order was entered remanding the child to the custody of the respondent. To reverse that order the relatrix has perfected this appeal.

The only point urged by the relatrix is that the County Court was without jurisdiction over her at the time of the alleged proceedings for adoption of Alice J. Barkdull, and that, therefore, the decree of adoption entered in the County Court was void and of no effect. That the relatrix was not served with process in the adoption proceedings is apparent from the face of the record, for the summons which was issued in those proceedings was returned "Not Found", as to both the relatrix and her husband, Charles J. Barkdull, the father of the child. The Statute on Adoption, Cahill's Illinois Statutes, ch. 4, par. 2, provides that the adoption petition shall state the name of each of the parents of the child sought to be adopted, with their residence, so far as the same may be known to the petitioner, and that such parents "shall be made defendants by name and shall be notified of such proceedings, by summons, if residents of this State, in the same manner as is now or may hereafter be required in chancery proceedings by the laws of this State, except only that the summons shall be made returnable at any time within 30 days after the date thereof." Both the parents of the child were named in the petition for adoption. They were both residents of Cook County at that time.

It is contended by the respondent in the proceedings

When former were presented to the trial court and after hearing all the evidence, the court found that the child, Alice J. Marshall, was lawfully adopted by the respondent James L. Marshall, under a legal decree of adoption, and an order was entered transferring the child to the custody of the respondent. The evidence that shows the relative has performed this duty.

The only point urged by the relative is that the County Court was without jurisdiction over her at the time of the alleged proceedings for adoption of Alice J. Marshall, and that, therefore, the decree of adoption entered in the County Court was void and of no effect. That the relative was not counsel with process in the adoption proceedings is apparent from the face of the record, for the summons which was issued in these proceedings was returned "Not found," as to both the relative and her husband, Charles J. Marshall, the father of the child. The statute on adoption, Illinois Statutes, ch. 6, sec. 2, provides that the adoption petition shall state the name of each of the parents of the child sought to be adopted, with their residence, so far as the same may be known to the petitioner, and that when the child is under sixteen years of age and shall be notified at such residence, by summons, if residents of this State, in the same manner as is now or may hereafter be required in ordinary proceedings by the law of this State, except only that the summons shall be made returnable at any hour of the day after the date thereof. Both the parents of the child were named in the petition for adoption. They were late witnesses at Cook County at that time.

at bar, she having been one of the petitioners in the adoption proceedings, that the service of process against the relatrix here was unnecessary in the adoption proceedings, because in those proceedings she executed a written consent to the adoption of her child, Alice, by the respondent here and her husband, who were the petitioners in the adoption proceedings, which written consent was duly filed in the County Court in connection with those proceedings. If that contention is in accord with the facts, we are of the opinion that the County Court had jurisdiction over the relatrix, the mother of the child, to enter an adoption decree which would be binding on her. As above noted, the statute requires that the parents of the child named in the petition for adoption shall be notified of those proceedings by summons "in the same manner as is now or may hereafter be required in chancery proceedings by the laws of this State." It is one of the maxims of chancery practice that one, being an adult, may voluntarily confer upon the court jurisdiction over his person by appearing in such proceedings as may be pending against him, such voluntary appearance being construed as a waiver of the service of process. 21 R.C.L. p. 1262, par. 3, 21 C.J. p. 365, par. 372. Montgomery v. Brown, 7 Ill. 581, 584. Process is required solely for the purpose of notifying a defendant of the proceedings which have been instituted against him, so that he may have the opportunity of appearing and having his day in court. Where he does appear and the record shows that he has had an opportunity to have his day in court, the requirements of the statute are fully met. In our opinion, where it is shown that the parent of a child named in a petition for adoption of such child has

of fact, the having been one of the petitioners in the
adoption proceedings, that the matter of persons against the
petitioners was not necessary in the adoption proceedings,
because in those proceedings the persons who executed a written consent
to the adoption of her child, Alice, by the respondent have and
her husband, was not the petitioners in the adoption proceedings,
which written consent was only filed in the County
Court in connection with those proceedings. It was contended
that in connection with this matter, as one of the petitioners
the County Court had jurisdiction over the estate, the
matter of the child, to enter an adoption decree which would
be binding on her. At above stated, the statute requires
that the parents of the child named in the petition for
adoption shall be notified of those proceedings by summons.
"In the same manner as in any other proceeding be required
in summary proceedings by the laws of this State." It
is one of the maxims of summary procedure that one, being
an adult, may voluntarily contract upon his own judgment
over his person by appearing in such proceedings as may be
required against him, such voluntary appearance being equivalent
to a waiver of the summary procedure. At N.Y. v. 1880,
N.Y. v. 1881, p. 100, per 1881. 1881 v. 1881, 7
N.Y. 1881, 1881. The statute is required solely for the purpose
of notifying a defendant of the proceedings which have been
instituted against him, so that he may have the opportunity
of appearing and having his day in court. Where no such effort
has been made that he has not been notified in time
to be in court, the proceedings are voidable and will
not be set aside, where it is shown that the parent of
a child named in a petition for adoption of such child has

executed a writing, certifying to the effect that such parent does "hereby consent to the adoption of said child" by the petitioners in those proceedings, "in manner and form as provided by" the adoption laws of this State, and such written consent, so executed by the parent, is entitled, "In the Matter of the Petition of" (the petitioners) "to adopt" (the child) and is duly filed in the court in which the adoption proceedings are pending, such parent is thereafter precluded from contending that the court which entered the decree of adoption was without jurisdiction over such parent because the process which was issued in that proceeding was not formally served upon him or her, and this, although the written consent did not, in words, recite that the parent waived service of process and enter appearance in the proceeding. We therefore hold that the sole question presented on this appeal is: Did the relatrix execute such a written consent to the adoption of her child, in connection with the proceedings brought to accomplish such adoption, as the respondent here contends? The respondent contends that she did, while the relatrix contends, at least by inference, that she did not.

The record shows that the child involved in these proceedings, Alice J. Barkdull, was the daughter of the relatrix Mary Barkdull Weiner and her then husband, Charles J. Barkdull; and that Lucien H. Barkdull, Jr., one of the petitioners in the adoption proceedings was the brother of Charles J. Barkdull, and that the other petitioner, Agnes J. Barkdull, the respondent here, was the wife of Lucien H. Barkdull, Jr. The father of these two brothers was Lucien H. Barkdull, a lawyer who represented the petitioners in the adoption pro-

ceedings. The record further shows that in May 1915, three years after the adoption decree was entered in the County Court of Cook County, the relatrix here filed a bill for divorce against her husband Charles J. Barkdull, in which proceedings the defendant's father, Lucien E. Barkdull, Sr. represented him as his attorney. The decree of divorce was duly entered on May 26, 1915. Since that decree the relatrix has married one Weiner. In her bill for divorce the relatrix alleged that she and her husband, Charles J. Barkdull, were married on October 9, 1911, at Crown Point, in the State of Indiana, and that they lived and co-habited together as husband and wife until June 10, 1912, when, it is alleged the defendant deserted her. The decree of adoption was entered in the County Court of Cook County on June 20, 1912, and that decree recited that the child, Alice, was then of the age of "over one month. (five weeks)" In her bill for divorce the relatrix here, alleged that this child on June 20, 1912, the date when the adoption decree was entered, was six weeks old.

As above stated, although the relatrix, in the testimony given by her on the hearing of her petition for a writ of habeas corpus, nowhere states, in so many words, that she did not execute the written consent to the adoption of her child, she does do so indirectly, because she testified that she knew nothing about these adoption proceedings until the time of her divorce suit against her husband in 1915. In this connection her counsel asked her when she first learned "that proceedings had been started or that some attempt had been made to adopt your baby?" Her answer was, "When I got my divorce." She further testified that at the time of the

adoption proceedings she had no personal knowledge that such proceedings were being taken.

The respondent, Agnes J. Barkdull, testified that on the morning of the day the adoption case was heard in court, which was on June 20, 1912, the relatrix brought the child to her, "all ready to take to court" and turned the baby over to the witness saying, "Well, I brought you the baby, you can have her, and I know you will be good to her, because you have been good to me, and of course, Charles being away for his health, I can go and do as I please now." One of the findings recited in the adoption decree is "that Charles J. Barkdull, the father of said child, is in ill health." Agnes Barkdull further testified that her sister-in-law, the mother of the child, remained at her house until she came back from court; that her father-in-law, Lucien H. Barkdull, who represented her and her husband in the County Court in the adoption proceedings, at the time of the hearing in that court, had in his possession the written consents of both parents of the child; that she saw both of them were signed by the respective parents, and they were presented to the court.

After this testimony was given by the respondent, the relatrix was re-called to the stand and she denied that she took the child over to the respondent, as the latter had testified. She said she was sick before the baby was born and for a long time afterward; and the grand-father of the baby pretended to be her friend and gave the child to Agnes and her husband "to take care of while I could recover."

From 3000 registered taxpayers on the 1960 schedule, 100,000
and 100,000 more were added.

the respondent, Agnes A. Bartholm, testified that on the morning of the day the abduction case was heard in court, which was on June 20, 1933, the witness brought the child to her, "All ready to take to court" and turned the baby over to the witness saying, "Well, I brought you the baby, you can have her, and I know you will be good to her, because you have been good to me, and of course, Charles being away for the health, I can be and so on I please you."

Bartholm A. Bartholm, the father of said child, in his testimony, Agnes Bartholm further testified that her sister-in-law, the mother of the child, remained at her home until she came back from court that day later-in-law, Agnes A. Bartholm, who represented her and her husband in the County Court in the abduction proceedings, at the time of the hearing in that court, and in his possession the witness accounts of both parents of the child; that the two boys at that time were signed by the respective parents.

The body presented in the photograph was not typical and gave the impression of being very young. The body was of a young man, about 20 years of age, and was dressed in a light blue shirt and dark trousers. The body was lying on its back, with its arms at its sides and its legs slightly apart. The body was lying on a light-colored surface, possibly a bed or a table. The body was lying on its back, with its arms at its sides and its legs slightly apart. The body was lying on a light-colored surface, possibly a bed or a table.

It appears from the record that Charles J. Barkdull has also re-married since the divorce proceedings involving him, and for some years has been living in Denver, Colorado. He testified that the first intimation he had that his wife desired to have the child adopted was one evening when he returned from work, and she said she had been over to see his sister-in-law, Agnes, and it was her desire that Agnes should adopt the baby, - "that she felt at that time that she was rather young to be tied down with a child" and "it was her desire, if possible, to place the child in the care of Agnes because she knew she would have a good home." He further testified that Agnes took this question up with her husband, the brother of the witness, and they were agreeable to the proposition and that he (the witness) also was "because the child could not be kept home and she had no desire at that time to take the child." He further testified that several days later his brother and wife came over to see them on the subject, and they stated that they would not take the child unless they could adopt it legally and they then talked the situation over with their father, who was a lawyer, and he later secured the forms used in such proceedings and outlined "what legal action was necessary in order to perfect adoption." He further testified that his wife and he stated at that time that they did not desire to appear in court and that his father explained that that would not be necessary; and further, that he also told the relatrix, that "this was a step he wished, before she signed her consent * * * she

It appears from the record that Daniel J.

Donohue has also represented since the divorce

case involving him, and for some years has been living

in Danvers, Vermont. He testified that the first time

that he had that the wife desired to have the child

admitted was one evening when he returned from work, and

she said she had been over to see his sister-in-law, Agnes,

and it was her desire that Agnes should adopt the child.

That she felt at that time that she was rather young

to be left down with a child, and it was her desire, if

possible, to place the child in the care of Agnes.

When she knew she would have a good home. He further

testified that Agnes took this question up with her husband,

and the brother of the witness, and they were agree-

able to the proposition and that he (the witness) also

was in favor of the child could not be kept home with her.

He testified that at that time he was the child. He further

testified that several days later his brother and

who came over to see them on the subject, and they stated

that they would not take the child unless they could adopt

it legally and they then advised the situation over with

their father, who was a lawyer, and he later advised the

three men in such proceedings and testified that legal

action was necessary in order to perfect adoption. He

further testified that his wife and he acted at that time

that they did not desire to appear in court and that his

father explained that that could not be necessary and

therefore, that he then took the petition, and "this was

a copy of it, before the night he returned."

would go out and talk this over with her people." (Two brothers and a sister). He further testified that she went out to see them and "took one of these written consent forms with her," and when she returned she said her family were agreeable to the proposition for the adoption of the child by Agnes and her husband, for they knew she would have a good home in their keeping; and "I believe the next night, or two or three days later we both signed written consents and turned them over to my father."

A sister of the respondent testified that she remembered the time when Alice was adopted and that she was present at her sister's home that day; and that while she was there the relatrix arrived with the baby which she turned over to Agnes, whereupon, Agnes and the witness prepared to leave, and the witness accompanied Agnes with the baby as far as the car; Agnes proceeding on down town to go to the court.

A Mrs. Warren testified that she was a trained nurse and that she first met the relatrix in 1912, about the first of June, when she was called to attend her in a professional way; that at that time the relatrix was confined to her bed by her illness and continued so until early in July, and that the first time she was able to walk out was the afternoon of July 4th.

The brother of the relatrix testified that his sister left the hospital following the birth of her child on May 14, 1912, and about two weeks later came to his home to stay; that at that time she was very sick and was con-

[illegible]

A sister of the respondent testified that she remembered the time when Allen was stopped and that she was present at her sister's home that day, and that while she was there the witness arrived with the baby which was named with its legal surname, Jones and the child was produced to father, and the witness remembered that Allen was with her at the time when respondent was there.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then gather information about the problem and the people involved. This information will be used to determine the cause of the problem and the people who are responsible for it.

The Bureau of the Federal Reserve Bank
has been advised by the Board of Directors
that it will, as soon as possible,
be ready to issue new gold coins.

fined to her bed for four or five weeks thereafter and that he was sure she was not out of the house on June 20, 1912, (the day of the hearing of the adoption proceedings in the County Court). The relatrix was again recalled to the stand and testified that on June 20, 1912, she was in bed at her brother's home with uremia poisoning and that she was confined to her bed from the time she went to her brother's home the latter part of May, continuously until about the first day of July. A sister of hers testified substantially to the same effect.

The files of the adoption proceedings of the County Court contain the written consent of the father of the child in question, to her adoption, entitled, "In the Matter of the Petition of Lucien H. Barkdull, Jr. and Agnes Barkdull to adopt Alice J. Barkdull," and reading: "I, Charles J. Barkdull of Chicago, in the County of Cook and State of Illinois, father of Alice J. Barkdull, a minor child, do hereby consent to the adoption of said child by Lucien H. Barkdull, Jr. and Agnes Barkdull, in manner and form as provided by an Act of the General Assembly of the State of Illinois, approved May 25, A. D. 1907. Dated this 3rd day of June, 1912." No such consent signed by the relatrix was produced in connection with the hearing on her petition for the writ of habeas corpus, and it appears from the record that no such written consent is now to be found in the files of the adoption proceedings in the County Court. There is in the record a photographic copy of the entries in the docket in the County Court in connection with the adoption proceedings, which reads, "June 15/12, Consent's of Charles J. Barkdull and Mary Barkdull, filed."

First day of July. A sister of mine testified substantially
about the latter part of May, contemporaneously with about the
continued to her from the Atlantic coast to her brother's
brother's home in Kansas following and that she was
and testified that on June 29, 1912, she was in bed at her
Twenty-fourth. The red ink was again resorted to the same
(the day of the hearing of the adoption proceedings in the
he was sent her was out of the house on June 29, 1912,
times to her but for that of the entire household and that

The first of the election proceedings of the County Court was the election of the County Clerk, who was elected by a vote of 100 to 0. The election of the County Clerk was held on the 1st day of June, 1891, at the County Court House, in the County of Cook and State of Illinois, under the authority of the County Court, organized May 28, 1891, under the act of June 1, 1891, in such cases as may be required by the County Court. The election of the County Clerk was held in accordance with the provisions of the act of June 1, 1891, in such cases as may be required by the County Court. The election of the County Clerk was held in accordance with the provisions of the act of June 1, 1891, in such cases as may be required by the County Court. The election of the County Clerk was held in accordance with the provisions of the act of June 1, 1891, in such cases as may be required by the County Court.

The adoption decree entered by the County Court finds, among other things, that "Both parents of said minor child, Charles J. Barkdull and Mary Barkdull, consent to the adoption of said child by the petitioners, Lucien H. Barkdull, Jr. and Agnes J. Barkdull, his wife." The divorce bill filed by the relatrix, three years after the adoption proceedings, was duly verified by her affidavit, and in that bill she alleged "that as the fruits of said marriage, the parties have had born unto them one child, Alice Jean Barkdull, three years of age, and said child was adopted by Lucien H. Barkdull, Jr. and wife on June 20th, 1912, when said child was six weeks old, first securing the written consent and knowledge of both of the natural parents of said child. The said Lucien H. Barkdull, Jr. is a brother of the defendant in this proceeding." In the answer filed by Charles J. Barkdull to the bill of his wife, in which she sought to procure a divorce from him, he admitted the allegations made by her with reference to the birth of their child, "who was adopted by Lucien H. Barkdull, Jr., a brother of the defendant herein and his wife on June 20th, A. D. 1912, when said child was six weeks old, and this defendant further admits that both he and the mother of said child gave their written consent to said adoption and that both were aware of the time and place of said happening." There was also introduced in the case at bar the certificate of evidence submitted by the relatrix in support of her bill for divorce, from which it appears that upon her direct examination by her counsel, Coleman S. Everett, (since deceased) she was asked whether any children had been born of her marriage

The deposition taken by the County Court Clerk, among other things, that "both parents of said child, Charles J. Barkhill and Mary Barkhill, consent to the adoption of said child by the petitioners, Lucien H. Barkhill, Jr. and Agnes J. Barkhill, his wife." The divorce bill filed by the petitioners, three years after the adoption proceedings, was duly verified in New York City, and in 1902 said the alleged "fact on the issue of said divorce, the parties have had been made known to said child, Agnes Barkhill, three years of age, and said child was changed by Lucien H. Barkhill, Jr. and wife on June 20th, 1912, when said child was six weeks old, it not seeming the witness to have been notified of said adoption by the parties at that time. The said Lucien H. Barkhill, Jr. is a brother of the defendant in this proceeding." In the answer filed by Charles J. Barkhill to the bill of his wife, in which she sought to rescind a divorce from him, he admitted the allegations made by her with reference to the birth of their child, who was adopted by Lucien H. Barkhill, Jr., a brother of the defendant herein and his wife in June 20th, A. D. 1912, when said child was six weeks old, and this statement further states that he had the subject of said bill then and there consent to said adoption and that both were present at the time and place of said happening. There was also introduced in evidence the case of the certificate of adoption submitted by the petitioners in support of their bill for divorce, from which it appears that upon their divorce from the defendant, Lucien H. Barkhill, Jr., the parties and child visited and resided for some time at the residence

and she answered "One, Alice Jean, a girl." She was then asked the following questions and gave the following answers: "Q. Where is that baby now? A. Adopted by the brother of my husband. Q. The baby has a good home and is well taken care of? A. Yes."

The trial court remarked in the course of the hearing of the proceedings at bar that the real question presented was whether or not the relatrix gave her consent to the adoption of her child. We have stated above that in our opinion, if she executed such a consent in writing, knowing that the adoption proceedings were pending or about to be instituted, and that writing was duly presented to and filed in the County Court in connection with the adoption proceedings, the relatrix is not in a position now to attack the jurisdiction of the County Court in those proceedings, solely on the ground that she was not formally served with summons. If, upon hearing the evidence, the substance of which we have outlined above, the trial court was of the opinion that the relatrix did execute such a consent with knowledge of the adoption proceedings, and that it was presented to the County Court, we are of the opinion that this court is not in a position to hold that such a finding was against the manifest weight of the evidence in that regard. We appreciate the fact that the respective and opposite positions of the parties are not only supported by their own testimony, but that each has some corroboration, but there are certain undeniable facts apparent from the record, which, in our opinion, tend strongly to

and the respondent "Q. Now, about the 1st of May, 1900, you were then
called the following questions and gave the following answers:
"Q. About the 1st of May, 1900, you were then
brother of your husband. A. The lady was a good woman and in
well known since 1871 A. Yes."

The trial court sustained in the course of the
hearing of the proceedings at that time the real ques-
tion presented was whether or not the respondent gave her
consent to the adoption of her child. He has stated
above that in our opinion, it was executed upon a contract
in writing, knowing that the adoption proceedings were
pending or about to be instituted, and that writing was
only presented to and filed in the County Court in con-
nection with the adoption proceedings, the witness in
not in a position now to attack the jurisdiction of the
County Court in those proceedings, solely on the ground
that she was not formally served with summons. It, upon
hearing the evidence, the substance of which is here
set forth, the trial court was in the exercise of its
discretion to sustain the judgment with the exception
of the adoption proceedings, and that it was competent to
do so. It is not the duty of the court to set aside
its judgment on a petition to hold that such a finding was
erroneous and without weight of the evidence in that case
and, as respects the case that has been submitted to
the court, the finding of the trial court was not only supported
by facts and testimony, but that such was the evidence
that, but for the evidence submitted to the court
from the County Court, it was manifest, that, without it

support the contentions of the respondent. It appears that within two or three weeks after this child was born she and her husband separated, and it appears further, without contradiction, that this child at or about the time of this separation, came into the possession and custody of the respondent and that she has been in her custody continuously since that time. So far as the record shows, the relatrix has never complained of that situation until now, nor attempted to show that the proceedings involving the adoption of her child were without her consent, although, on her own admission, she has known about those proceedings at least since May 1915. Furthermore, this position which she now takes is flatly contradictory to her own sworn statements, contained in her bill of divorce, where she says that her child then three years old had been adopted three years previously by her brother-in-law and his wife, they "first securing the written consent and knowledge of the natural parents of the child." The relatrix in the proceedings at bar nowhere even intimates that she made that sworn representation at that time inadvertently. She is now married again. Just when that second marriage took place the record does not disclose. In view of all these facts, and especially in view of her sworn averments in her bill for divorce and her testimony in that case in support of those allegations, and the fact that the relatrix, so far as the record shows, was entirely satisfied with the situation and made no effort of any kind to change it for nearly eleven years, we are of the opinion that the trial court was entirely justified in finding that the relatrix did give her consent

support the maintenance of the respondent. It appears that within two or three weeks after this child was born she and her husband separated, and it appears further, without contestation, that this child at or about the time of this separation, came into the respondent and custody of the respondent and that she has been in her custody continuously since that time. As far as the respondent knows, the relative has never resided at that address until now, nor attempted to show that the proceedings involving the adoption of her child were without her consent, although, on her own admission, she has known about those proceedings at least since May 1918. Furthermore, this position which she now takes is directly contrary to her own sworn statements, contained in her bill of divorce, where she says that her child from these years old had been adopted three years previously by her mother-in-law and his wife, they "first securing the written consent and knowledge of the natural parents of the child". The relative in the proceedings at that time ever intimated that she made that sworn statement then at that time knowingly. She is now worried again that when that second marriage took place the record does not show. In view of all these facts, and especially in view of her sworn statements in her bill for divorce and her testimony in that case in support of those allegations, and the fact that the relative, as far as the record shows, was actively entangled with the adoption and made an effort of any kind to change it for nearly eleven years, as a view of the position that the trial court was originally justified in taking that the relative has given her consent

to the adoption of her child, as contended by the respondent, and that she therefore is not now in a position to raise the question she attempts to, involving the jurisdiction of the County Court.

For the reasons stated, the judgment of the Superior Court, finding that the child in question was detained by the respondent, Agnes J. Barkdull, lawfully and was properly in her custody, and remanding said child to the custody of the said Agnes J. Barkdull, is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

to the adoption of her child, as contended by the respondent, and that the doctrine is not now in a position to raise the question she contends for, involving the jurisdiction of the Court here.

But the respondent stated, the judgment of the Superior Court, finding that the child in question was obtained by the respondent, Agent J. Matthews, lawfully and was property in her custody, and recommending said child to the custody of the said Agent J. Matthews, is affirmed.

RECOMMENDATION AFFIRMED.

ENTERED FOR RECORD, W. J. WHITE.

132 - 20380

CATHERINE ROGAL,

Appellee,

v.

ANTHONY FORSCHNER,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

241 I.A. 605

Opinion filed March 10, 1926

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Catherine Rogal, brought this action against the defendant, Anthony Forscher, alleging that she had been injured in a collision between an automobile in which she was riding as a guest of Charles Rogal, and an automobile owned and operated by the defendant. At the time of this collision the plaintiff's name was Catherine Walsh. Since that time she has married Charles Rogal. To the declaration the defendant filed a plea of the general issue and two special pleas; in the first of which he denied that he was operating, controlling or managing the car which ran into Rogal's car at the time in question; and in the second of which, he denied that the person who was operating, managing or controlling the car, was in his employ or subject to his orders or engaged in the pursuance of any of his business. The issues thus formed were submitted to a jury, and at the close of the plaintiff's case the defendant moved the court to find the issues in his favor. That motion was denied. The defendant thereupon submitted no evidence but rested his case,

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241 I.A. 605

Opinion filed March 10, 1911

THE UNITED STATES OF AMERICA

vs.

JOHN J. HENRY, Defendant

Comes now the Defendant, JOHN J. HENRY, and moves the Court for an order directing the Plaintiff to show cause why he should not be committed to prison for contempt of Court.

And he moves the Court for an order directing the Plaintiff to show cause why he should not be committed to prison for contempt of Court.

And he moves the Court for an order directing the Plaintiff to show cause why he should not be committed to prison for contempt of Court.

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and again submitted a motion for a directed verdict, which motion was also denied. The case was then submitted to the jury and a verdict was returned in favor of the plaintiff, assessing her damages at the sum of \$3,000. The usual motions were thereupon made and overruled and judgment was entered on the verdict. To reverse that judgment the defendant has perfected this appeal.

A number of questions are raised as to whether sufficient appears by the bill of exceptions to enable the defendant to raise certain points on which he relies, but in our view of this case it will not be necessary for us to pass upon them. After the original bill of exceptions was filed, as incorporated in the record, an additional bill of exceptions was filed, and subsequently, certain amendments thereto.

In support of his appeal the defendant contends that the evidence submitted in behalf of the plaintiff failed to show that the automobile which struck the Rogal car was being negligently operated. It is pointed out that the proof that there was a collision does not make out a case of negligence; that the plaintiff alleges in her declaration that the defendant was guilty of negligence in operating his automobile and that it was driven at an unreasonable, improper and unlawful rate of speed; and it is then contended that there is no evidence in the record to substantiate these charges. In our opinion, the record does not bear out that contention. Rogal testified that the collision took place at the intersection of Cottage Grove avenue and 79th streets; that he was

driving his Dodge touring car west in 79th street, about two o'clock in the morning on February 5, 1923; that the weather was very cold and the side curtains were up, except on the left side in front; that there was isinglass in these curtains, which permitted him to see through them; that he slowed up and almost came to a stop on the east side of Cottage Grove avenue and looked south and saw nothing; and looked to the north and saw some small headlights some distance away, - "seven hundred feet or so;" that he considered he had plenty of time to get across and he proceeded at a speed of 6 or 7 miles an hour; that he did not pay any further attention to the car approaching from the north, and just as his car was half way over the west rail of the west track of the double line street car tracks on Cottage Grove avenue, his car was struck in the rear, and it turned around three times and landed over on the southwest corner of the intersection, and turned over. This witness testified that he could not tell the speed of the car whose lights he saw, but that after the collision, the car which ran into him was 200 feet away to the south on Cottage Grove avenue, over near the west curb. In our opinion, this evidence was sufficient to warrant the jury in finding that the defendant's car was being driven in a negligent manner and at an excessive rate of speed. In order to support such a finding it is not necessary that there be evidence directly bearing upon the question of the speed of the defendant's car. If that car was approximately 700 feet north of the intersection when Rogal started to drive his car across the intersection at 6 or 7 miles an hour; and it struck

[illegible]

Rogal's car at the point testified to by him and then went 200 feet before coming to a stop, those facts would be sufficient to justify the jury in concluding that it was being driven at an excessive rate of speed and in a negligent manner.

The defendant next contends that the trial court erred in denying his motions for a directed verdict, because the evidence is such that the trial court should have held that the plaintiff was guilty of contributory negligence, as a matter of law. On this point Rogal testified that the plaintiff was sitting in the front seat, at his right, when the collision took place; that she had on a fur coat with a high collar and that she was looking straight ahead, and relied upon him to do the driving. The plaintiff testified to the same effect, and said she was facing west and did not look around at any time.

Before the plaintiff could recover it was necessary for her to prove that she was in the exercise of ordinary care for her own safety and she was not relieved from that duty because she was a passenger in Rogal's automobile. Where a passenger has an opportunity to learn of danger and avoid it, it is the duty of such passenger to warn the driver of the approaching danger. The passenger has no right, because someone else is driving a vehicle, to omit reasonable and prudent efforts on his or her part to avoid danger. Pienta v. Chicago City Ry. Co., 284 Ill. 246. Opp v. Pryor, 294 Ill. 538; Griffenban v. Chicago City Ry. Co., 299 Ill. 590. But it does not follow that under a given state

Wagon's out at the point testified to by him and then came
and then before coming to a stop, these facts would be
evident to testify the jury is concluding that it was
being driven at an excessive rate of speed and in a negli-
gent manner.

The defendant next contends that the trial court
erred in denying his motion for a directed verdict, because
the evidence is such that the trial court should have held
that the plaintiff was guilty of contributory negligence, as
a matter of fact. On this point the plaintiff testified that the
defendant was sitting in the front seat, at his right, when
the collision took place; that she had on a hat with
a high collar and that she was looking straight ahead, and
refused when he to be driving. The plaintiff testi-
fied to the same effect, and said she was looking west and
did not look around at any time.

Before the plaintiff could recover it was necessary
for her to prove that she was in the exercise of ordinary
care for her own safety and she was not relieved from that
burden because she was a passenger in the defendant's wagon.
When a passenger has no opportunity of seeing or hearing
and would it be in the duty of such passenger to take the
driver of the wagon and himself. The defendant was an
expert, because she was in driving a vehicle, so only
passenger and should listen to his or her part in driving
the wagon. On this point the plaintiff testified that she was
not in the wagon, but it does not follow that under a given state

of facts, one who may not look up and down a cross street at an intersection, and observe a dangerous situation and warn the driver of it, should be held to have been guilty of contributory negligence as a matter of law. In the Pienta case, supra, the plaintiff was injured while he was riding in the vehicle of another, which was being driven by the latter. The evidence relating to the question of whether the plaintiff was guilty of contributory negligence, in failing to observe the danger and warn the driver, was the subject of conflicting testimony which the court stated presented a question of fact. It was argued by the defendant in that case that the plaintiff was shown to be guilty of contributory negligence, as a matter of law. On that question the court said: "While the burden of proof is always on the plaintiff, in proceedings of this kind, to show that when the injury was received he was in the exercise of ordinary care, that question is one of fact, which must be determined by the circumstances attending and surrounding the injury. Whether the evidence tends to prove such care is a question of law. A court can only determine adversely to the plaintiff when no other conclusion can be reasonably drawn from the uncontradicted facts and from the evidence that is favorable to the plaintiff. 'There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do

1. The first question is whether the plaintiff is entitled to recover damages for the injury to his property. The plaintiff claims that the defendant's negligence caused the injury. The defendant denies this and claims that the injury was caused by the plaintiff's own negligence. The court must decide which party is more likely to be correct. The court will consider the evidence presented by both parties and make a finding of fact. If the court finds that the defendant was negligent, then the plaintiff is entitled to recover damages. If the court finds that the plaintiff was negligent, then the plaintiff is not entitled to recover damages. The court will also consider the amount of damages claimed by the plaintiff and make a finding of the appropriate amount of damages to be awarded. The court will then enter a judgment in favor of the party entitled to recover damages and award the appropriate amount of damages.

under like circumstances' (Stack v. East St. Louis Railway Co., 245 Ill. 308) Ordinarily the question of contributory negligence is one of fact for the jury." The court held that, in view of the evidence, the issue of contributory negligence had been properly submitted to the jury for their determination.

In the Gap case, supra, the question involving contributory negligence arose in connection with an instruction in which the trial court told the jury that if they believed from a preponderance of the evidence that the plaintiff was a guest in the automobile at the time of the accident, at the owner's invitation, "without authority to direct or in any manner control the conduct of the driver of the automobile, and that before and at the time of the accident, she was in the exercise of ordinary care for her own safety, then the negligence of the driver of the automobile, if any, could not be imputed to her." The court held that under the evidence in that case, this instruction was wrong, remarking that instructions should be given "as an aid to the jury, in deciding the case," and further, that the plaintiff was shown to have had at least equal opportunity to observe the approaching train with that possessed by the driver of the automobile, and "being bound to prove the exercise of ordinary care by herself, it was no less her duty than that of the driver to observe and avoid danger, if practicable, and to warn the driver." The jury might well have inferred from instruction given in that case that the plaintiff was under no obligation to look out for danger and warn the driver if she observed it, and for

under the circumstances' (Brown v. Board of Education, 347 U.S. 483). Ordinarily the question of contributory negligence is one of fact for the jury. The court held that, in view of the evidence, the issue of contributory negligence had been properly submitted to the jury for their determination.

In the case at hand, the question involving contributory negligence is submitted to the jury. The court in which the trial was held said the jury that if they believed from a preponderance of the evidence that the plaintiff was a guest in the automobile at the time of the accident, at the owner's invitation, without authority to direct or in any manner control the conduct of the driver of the automobile, and that before and at the time of the accident, he was in the position of a guest, then the negligence of the driver of the automobile, if any, would not be imputed to her. The court held that under the evidence in that case, this instruction was proper, something that instructions should be given to all to the jury, in deciding the case, and further, that the plaintiff was shown to have been at least equal opportunity to observe the negligent state of the car pointed out by the driver of the automobile, and being found to have the exercise of ordinary care by herself, it was held that only that of the driver is liable and not the plaintiff. It was held, and so with the driver. The jury at the trial was instructed that instructions given in that case that the plaintiff was shown to have been negligent in that the driver and with the driver it was required to, and the

that reason the court held the instruction was bad.

This question arose in the Griffenhan case, supra, also in connection with an instruction, the giving of which was held to be error under the facts there presented, but in our opinion the case is not an authority which supports the contention that under the facts presented in the case at bar, the court should have held that the plaintiff was guilty of contributory negligence, as a matter of law. In our opinion, the question of whether the plaintiff was guilty of contributory negligence, by reason of her failure to look to the north and observe the approaching car and warn Regal of it, under all the circumstances disclosed by the evidence, was properly treated by the trial court, as a question of fact for submission to the jury, under proper instructions not here complained of, some of which were submitted by the defendant. It has been held repeatedly that it cannot be said, as a matter of law, that a failure to look when one is about to cross railroad tracks or street railway tracks or street intersections, amounts to negligence, as a matter of law, under any and all circumstances. Henry v. C. C. C. & St. L. Ry. Co., 236 Ill. 219; Winn v. C. C. C. & St. L. Ry. Co., 233 Ill. 132; Chicago & Northwestern R. R. Co. v. Dunleavy, 129 Ill. 132; Morrison v. Flowers, 308 Ill. 189. In the Dunleavy case, the Supreme Court said that "Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is

that because the court held the instruction was valid.

This question arose in the Griffin case.

Again, also in connection with the instruction, the giving of which was held to be error under the facts there presented, but in our opinion the case is not an authority which supports the contention that under the facts presented in the case at bar, the court should have held that the defendant was guilty of contributory negligence. As a matter of law, in our opinion, the question of whether the plaintiff was guilty of contributory negligence, by reason of her failure to look to the north and observe the approaching car and train, is a question of fact. The circumstances disclosed by the evidence, was, as stated by the trial court, as a question of fact for submission to the jury, under proper instructions and such explanation of same as which were submitted by the defendant. It has been held repeatedly that it cannot be said, as a matter of law, that a defendant is negligent when he is shown to have neglected to look to the north and observe the approaching car and train, under proper instructions, as a matter of law, under the facts and circumstances shown. Griffin v. Southern Railway Co., 100 Ga. 100, 32 S.E. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se."

It is contended further that the damages awarded the plaintiff are excessive. The plaintiff testified that for three years prior to the accident she had been employed as a demonstrator for a cold cream and powder company, earning on an average of between forty and fifty dollars a week. As a result of the injuries she received at the time of this collision she remained in the hospital five days and then was taken to the home of Rogel's mother where she remained for three months. She testified she had five severe cuts around one of her eyes, with a piece of glass in her eye and another stuck in the cheek bone; and also that her back was badly hurt. She testified that during the three months above referred to her face remained swollen and black and blue, and that she experienced pain in her face and cheek bone, and that her eye watered. The doctor who took care of the plaintiff testified that he attended her at the hospital and that she was under his observation for a period of three months; that she received a lacerated injury of the face underneath the right eye and down on the nose to some extent; that her eye was bloodshot and her tear-duct was not operating properly and the tears kept running from her eye; that in addition to that, she presented some symptoms

...the fact that the ...
...the fact that the ...
...the fact that the ...

It is suggested further that the company should
be financially sound. The financial condition of
the company prior to the accident was not satisfactory
as a consequence of a sale of assets and other company funds.

The only one derived at the time of
the receipt of the material was received at the time of
this collection and remained in the hospital five days and
then was taken to the home of Regal's mother where she re-
mained for three months. She testified she had five nervous
attacks around one of her eyes, with a piece of glass in her
eye and another attack in her mouth; she also told her

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

of shock and that bruises of the extremities and back showed discoloration; that her eye was red and the tissues surrounding it were black and blue; that his treatment consisted of antiseptic applications; He also testified that a scar formed at the side of the laceration and that this scar became attached to the tissue and cheek bone and in cold weather becomes congested and discolored; that the injury had resulted in a certain amount of nervous irritation and caused a slight twitching of her eyelid, which symptoms are more aggravated in cold weather than in warm weather. He testified that no absolute assurance could be made that the condition could be remedied; that the skin could be separated from the bone, which would probably result in the lessening of the nervous irritation, but he doubted if anything could be done to improve the scar itself. He testified that the reasonable and customary value of the services he rendered was from \$125 to \$150. The plaintiff never returned to her employment, but the evidence shows that she and Regal were married about six months after the accident. We are not prepared to say, under all the circumstances disclosed by this record, that the damages awarded the plaintiff by the jury are such as to warrant this court in disturbing their finding. That the plaintiff received a painful injury is apparent, and the jury would be justified in concluding from the testimony that this injury had left a condition which would probably be of long standing if not permanent.

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testified that no cicatrized scar was caused by the
that the condition could be remedied; that the skin
could be separated from the bone, which would probably
result in the formation of the nervous irritation, but
be followed by anything could be done to improve the
her health. He testified that the reasonable and
reasonable value of the services rendered was \$100
\$100 in like. The plaintiff never returned to her work
employment, but the evidence shows that she had before the
nervous about six months after the accident. He was not
required to pay, under all the circumstances disclosed
by this record, that the defendant awarded the plaintiff
by the jury and such as to warrant this award in this
action. That the plaintiff received a
personal injury is evident, and the jury would be justi-
fied in concluding from the testimony that this injury
was not a trifling one and would result in a loss
amounting to not less than \$100.

pleas filed by him, denying that he was operating the car, and that the person who was operating it was his servant or engaged in his business, put those matters in issue and that the plaintiff failed to meet the burden which was her's, of establishing at least a prima facie case on either or both of them. The defendant did not deny ownership by special plea, and in the course of the trial his counsel expressly admitted ownership, and also that the defendant was in the car at the time of this accident. In that state of the record the plaintiff was not obliged to show anything further on the issues raised by these special pleas. A similar question was passed upon by this court in Howard, Admr., v. Amerson, case No. 26235; opinion filed April 29, 1935; not yet reported. In that case we held that where the defendant puts in issue the question of the operation of the automobile, by his servant, and the use of it in connection with his business, although the burden of establishing the affirmative on those matters by a greater weight of the evidence, remains with the plaintiff throughout the trial, a prima facie case is nevertheless made out on those questions by either proof to the effect that the defendant was the owner of the automobile or an admission of ownership on his part, and such prima facie case being made out on those questions by the plaintiff, either by such proof of ownership or such admission, the burden of proceeding with the evidence on the issues presented by such special pleas, is shifted to the defendant. The decisions on this question in the various jurisdictions are not in

pleased to be seen, saying that he was operating the
 car, and that the person who was operating it was his
 assistant or helper in the business, and that the
 in fact and that the defendant failed to meet the burden
 on which was based, or establishing at least a prima
 facie case on either or both of them. The defendant
 did not deny ownership by special plea, and in the course
 of the trial the defendant expressly admitted ownership.
 and also that the defendant was in the car at the time
 of the accident. It was stated at the hearing that
 the defendant was not entitled to any further testimony as
 the issues raised by these special pleas. A motion
 for judgment was granted upon the basis of the facts
 stated, and the court granted judgment for the plaintiff.
 and the verdict. In that case we held that when the
 defendant fails to issue the question of the operation of
 the automobile, in this instance, and the law is in
 substance that the defendant, although the burden of
 establishing the affirmative is placed upon him by a statute
 which is not without, similar with the plaintiff's burden
 on this, a third issue was presented, and we are
 now presented by that point in the case with the
 question as to what is the defendant's burden of proof
 of ownership in this case, and what the plaintiff's burden
 was in that connection by the defendant, which is
 not a question of ownership or non-ownership, but a question
 proceeding with the evidence on the issues presented by such
 special pleas, is related to the defendant. The defendant
 on the question of the burden of proof is not in

harmony. In the case last referred to we reviewed the two lines of decisions and we stated that in our opinion the better reasoned cases support the proposition as stated above. The cases holding that, on plaintiff's proof of negligence and that the defendant owned the car which collided with him, the burden of proceeding with the proof shifts to the defendant, proceed on the theory that the latter is best able to show that the car was driven by a stranger, if such was the fact, or on some errand having no connection with the defendant's business, if that was the situation. West v. Kern, 88 Oregon, 247; Houston v. Kests Auto Co. 65 Ore. 125; Knust v. Bullock, 59 Wash. 141; Morris v. Kohler, 41 N.Y. 42; Edgeworth v. Wood, 58 N.J.Law 463; Howard, Adm. v. Amerson, Ill. App. Ct., supra.

In the course of the instructions the court told the jury that if they found the issues for the plaintiff, then, in determining the amount of the damages, if any, they should take into consideration the facts and circumstances in evidence bearing upon the plaintiff's injuries and the nature and extent of such injuries, if any, and her pain and suffering resulting therefrom, if any, "and also such further pain or prospective pain and suffering and loss of health and strength as you may believe from the evidence, if any, she has sustained or will sustain in the future by reason of such injuries * * * and give her such sum as in your judgment under all the evidence and instructions of the Court will compensate her for the injuries she has sustained, if any, are claimed and alleged in the declaration herein." It is contended that the trial court erred in giving the part of

this instruction which is quoted, inasmuch as the declaration did not charge a permanent injury or permanent suffering, nor did it make any charge which would support a recovery by the plaintiff, based on any future pain or suffering. In our opinion the declaration contained sufficient allegations to support the giving of this instruction. In her declaration the plaintiff alleged that she was injured by reason of the negligence of the defendant in the operation of his car, and she alleged the various elements that entered into the injuries she claimed to have suffered as a result of the collision, and that by reason of these injuries she had "been made sick, nervous and disordered, and has so remained and continued and does so remain and continue up to the present time, during which time the plaintiff has suffered and does continue to suffer great bodily pain and mental distress; and that by reason of said injuries the plaintiff has developed internal disorders of a grievous and painful nature, and was and is thereby hindered and prevented and rendered incapable of performing her usual duties. * * * and has lost and will continue to lose divers profits which she otherwise would have accrued." While this declaration does not specifically allege that she will suffer pain and distress in the future, it does allege that she not only has suffered but that she continues to suffer, as set forth in the declaration, and in our opinion that is sufficient to support a recovery based on future suffering, providing the evidence is sufficient also.

It is finally contended by the defendant in support

This instruction which is quoted, inasmuch as the defendant
did not charge a permanent injury or permanent disability,
and did not allege any change which would prevent a recovery
by the plaintiff, based on any future pain or suffering,
in our opinion the defendant cannot be said to have
intended to support the giving of this instruction. In
the absence of the plaintiff's alleged facts and figures
by reason of the negligence of the defendant in the operation
of its car, and the alleged various elements that
entered into the injuries the claimant to have suffered as
a result of the collision, and that by reason of these injuries
the claimant was sick, nervous and distressed, and has
so remained and continued and does so remain and continue to
do so to the present time, during which time the plaintiff has
suffered and does continue to suffer great bodily pain and
mental distress; and that by reason of said injuries the
plaintiff has developed internal disorders of a permanent and
painful nature, and was and is thereby hindered and prevented
and rendered incapable of performing her usual duties.
" * * * and has lost and will continue to lose diverse profits
and the expenses would have incurred." While this declaration
does not specifically allege that she will suffer pain
and distress in the future, it does allege that she not only
has suffered but that she continues to suffer, as set forth
in the declaration, and in the opinion that is sufficient
to support a recovery based on future suffering, providing
the evidence is sufficient therefor.

of his appeal that the declaration filed by the plaintiff failed to state a cause of action and for that reason the defendant's motion in arrest of judgment should have been sustained. The basis of this contention is that the declaration failed to charge any duty owing from the defendant to the plaintiff and that where there was no such duty there could be no actionable negligence. It is true that the declaration does not allege a duty of the defendant towards the plaintiff, in so many words, but in our opinion, it does allege such facts as give rise to such a duty. An allegation specifically to the effect that a duty existed on the part of the defendant toward the plaintiff would be but the conclusion of the pleader. The proper way to cover that element in a plaintiff's case in a declaration, is to allege the existence of such facts as show that such a duty did exist. This, the declaration filed by the plaintiff in the case at bar, does.

For the reasons we have given, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, J. CONCURS;

TAYLOR, J. DISSENTING:-

I am unable to concur in the majority opinion. In the first place, there is no evidence that "these little headlights," which Regal testified he saw "700 feet or so"

of his - upon that the declaration filed by the plaintiff
failed to state a cause of action and for that reason the
defendant's motion in arrest of judgment should have been
granted. The basis of this contention is that the de-
claration failed to charge any duty owing from the de-
fendant to the plaintiff and that where there was no such duty
there could be no actionable negligence. It is true that
the declaration does not allege a duty of the defendant
towards the plaintiff, in no many words, but in our opinion
it does allege such facts as give rise to such a duty. An
allegation specifically to the effect that a duty existed
on the part of the defendant towards the plaintiff would
be not the conclusion of the law. The proper way to
state that element is a plaintiff. It was in a declaration
to allege the existence of such facts as show that such
a duty did exist. This, the declaration filed by the plain-
tiff in this case does not.

For the reasons we have stated, the judgment of the
court is reversed.

REVEREND JUSTICE
JUDGMENT REVERSED

REVEREND JUSTICE
JUDGMENT REVERSED
I am unable to dissent in the majority opinion.
In the first place, there is no evidence that there is
any duty owed by the defendant to the plaintiff.

away to his right, were upon the defendant's car, and, secondly, if the car in which the plaintiff was riding was going, as Rogal testified, only five or six miles an hour and traveled, within the intersection, 45 feet before the collision (Rogal says Cottage Grove avenue is about 75 feet wide), then, it would have been necessary for the car, that was 700 feet away to his right, to travel, at least, fifteen times as fast, that is, from 75 to 90 miles an hour.

Of course, the mere proof of a collision between Rogal's car and that of the defendant does not make out a *prima facie* case of negligence on the part of the defendant; especially is that true when, as here, the evidence shows that the defendant's car was somewhere at Rogal's right.

From the evidence, one might suspect that the lights were on the defendant's car, and that as there was a collision, even though the defendant's car was at the right of Rogal, he, the defendant, drove negligently, but mere suspicion does not make out a case. The evidence must be convincing. It is not enough to prove something merely plausible. There must be sufficient evidence to impel the conclusion, as the result of rational thought, that the necessary facts are true.

Inasmuch as the evidence shows that the car with "these little headlights" was 700 feet away, that that car would have to travel from 75 to 90 miles an hour to collide with Rogal's car; and as there is no evidence that the defendant's car was the one that had the "little head-

every to his right, were when the defendant's car, and, accordingly, it is the car in which the plaintiff was riding was going, as before testified, only five or six miles an hour and traveling, within the intersection, at 700 yards the collision (Hagel says Hagel never saw it about 75 feet wide), then, it would have been necessary for the car, that was 700 feet away to his right, to travel, at least, fifteen times as fast, that is, from 75 to 22 miles an hour.

Of course, the mere proof of a collision between Hagel's car and that of the defendant does not make out a prima facie case of negligence on the part of the defendant, especially in that time when, as here, the evidence does not show the defendant's car was moving at all.

From the evidence, one might suppose that the plaintiff was in the defendant's car, and that he was not a witness, even though the defendant's car was at the right of Hagel, he, the defendant, drove negligently, and also suggests that he was not a case. The evidence may be convincing. It is not enough to prove something merely plausible. There must be sufficient evidence to leave the jury, as the result of rational thought, that the necessary facts are true.

There is no evidence that the defendant's car was moving at the time of the collision, and the fact that the defendant's car was moving at the time of the collision does not make out a prima facie case of negligence on the part of the defendant, especially in that time when, as here, the evidence does not show the defendant's car was moving at all.

lights" on; it follows that the only proof of the alleged negligence of the defendant lies in the single fact of collision. That, in my judgment, as I have said, is not enough. Considering that it was the obligation of the plaintiff to make out a cause of action, it does not seem reasonable to me or just, or according to the law, to mulct the defendant in damages on such very meager, unsatisfactory and unconvincing evidence as the record here discloses.

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ALBERT ROGENBUCK and
AUGUSTA ROGENBUCK,

Appellants,

v.

A. JULIUS BREUNHAUS,

Appellee.

241 I.A. 605

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

The plaintiffs brought this action in the Municipal Court of Chicago, seeking to recover damages which they alleged had been suffered as a result of the action of the defendant in selling two lots to a third party, which the plaintiffs contended he had contracted in writing to sell to them, under the terms set forth in the contract; it being further contended by the plaintiffs that the defendant waived a strict compliance with the terms of the contract, so far as the time and amount of the payments it called for on the part of the plaintiffs was concerned. The issues made by the parties on their pleadings were submitted to the trial court without a jury, and at the conclusion of the hearing, counsel for the plaintiffs submitted certain written propositions of law, which he asked the court to hold as the law governing in the case, but the court marked them refused. The defendant submitted a motion asking the court to find the issues in his favor and the court announced that the defendant's motion would

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and described as follows:

1. *Phragmites* spp.

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THE FIRST REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

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Figure 1. The effect of the size of the sample on the accuracy of the results.

(continued from page 6)

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

Received 10/10/2010; revised 11/10/2010; accepted 12/10/2010.

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DATE OF DEPARTURE: 1964

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1. The first group of variables includes the demographic characteristics of the respondents, such as age, gender, and education level. These variables are used to control for potential confounding factors that may influence the relationship between the independent and dependent variables.

be allowed. After that had taken place, counsel for the plaintiffs stated that the plaintiffs would take a non-suit but the court denied their motion for a non-suit, and properly so, as it came too late. Weiss, et al v. Gorn, 263 Ill. App. 261. The court then found the issues against the plaintiffs and entered judgment that they take nothing by their suit, and for costs. The plaintiffs have perfected this appeal from that judgment.

Under date of October 11, 1920, the parties hereto entered into a contract in writing, under the terms of which the plaintiffs agreed to buy and the defendant agreed to sell the two lots in question, for the sum of \$1780.00. The contract provided that the purchase price for these lots was to be paid by the plaintiffs as follows: \$178.00 upon the execution of the contract, receipt of which was acknowledged at the time the contract was closed; the balance of \$1602.00 to be paid in monthly payments of \$12.00 or more, including interest, on November 11, 1920; and \$12.00 or more, including interest, on the eleventh day of each and every month thereafter "until October 11, 1925, when any unpaid balance becomes due and payable." All payments were to be made at the Standard Trust & Savings Bank. The interest was at 6 per cent, payable monthly on such sum as might then be remaining due. Under the terms of the contract the plaintiffs also undertook to pay all taxes and assessments levied upon the lots subsequent to the year 1920. The contract provided that in case of the failure of the plaintiffs to make any of the payments provided for, the contract should, at the option of the defendant, "be forfeited and determined," and

no answer, after that had been given, counsel for the
plaintiff stated that the plaintiff's would take a non-
suit but the court decided their action for a non-suit, and
properly so, as it was too late. Wright, et al. v. Jones
205 N.Y. 100, 101. The court then found the issues against
the plaintiff and entered judgment that they take nothing
by their suit, and for costs. The plaintiff's have contested
this appeal from their judgment.

Under date of December 11, 1900, the parties hereto
entered into a contract in writing, under the terms of which
the plaintiff agreed to buy and the defendant agreed to sell
the two lots in question, for the sum of \$1750.00, the con-
tract provided that the purchase price for these lots was to
be paid by the plaintiff as follows: \$125.00 upon the
execution of the contract, receipt of which was acknowledged
at the time the contract was signed; the balance of \$1625.00
to be paid in monthly installments of \$125.00 per month, including
interest, on November 11, 1900; and \$125.00 or more, including
interest, on the first day of each and every month
thereafter until November 11, 1902, when any unpaid balance
remained due and payable. All payments were to be made to
the Standard Trust & Savings Bank. The interest was at 6
per cent, payable monthly on each and every day on the remain-
ing balance. Under the terms of the contract the plaintiff also
agreed to pay all taxes and assessments levied on the
lots included in the contract. The contract provided
that in case of the failure of the plaintiff to make any
of the payments provided for, the contract should be at
once terminated, the property and improvements thereon

that in that event the plaintiffs were to forfeit all payments made by them in liquidation of all damages.

In addition to the payment of \$178.00, (being 10 per cent of the purchase price) called for upon the execution of the contract, it was agreed that the plaintiffs paid upon the same day the further sum of \$72.00, and a month later, November 11, 1920, they paid \$60.00. Except for those payments the plaintiffs did not pay any amounts to the defendant on the dates called for by the terms of the contract, namely, on the eleventh of each and every month. It was agreed, however, that on January 3, 1921 they paid \$60.00; on February 25, 1921, \$100.00; on August 23, 1921, \$20.00; and on March 20, 1922, \$35.00. On May 4, 1922, they paid the general taxes levied on the lots for the year 1921, amounting to \$26.06. On August 3, 1922, they made a further payment toward the purchase price, amounting to \$25.00, and on October 16, 1922, a similar payment amounting to \$50.00. On November 26, 1922, they paid a special assessment levied against the lots, amounting to \$65.97, and on December 6, 1922, the plaintiffs paid the first installment of a special assessment which had been due since the previous January, amounting to \$201.48. In the following spring, namely, on May 1, 1923, the plaintiffs paid the general taxes levied against the lots for the year 1922, amounting to \$27.38. All these payments made by the plaintiffs toward the purchase of these lots under this contract aggregate something over \$900.00.

It further appears from the record that without any notice to the plaintiffs, this property was sold by the de-

that in that event the plaintiff was to forfeit all payments made by them in liquidation of all damages.

In addition to the payment of \$750.00 (being

the sum of the purchase price) called for upon the execution of the contract, it was agreed that the plaintiff

should pay the balance of the purchase price of \$7,000.00 and

on or before November 15, 1930, they paid \$500.00. Thereafter

for these payments the plaintiff did not pay any amount

to the defendant on the dates called for by the terms of

the contract, namely, on the fifteenth of each and every

month. It was agreed, however, that on January 5, 1931,

they paid \$500.00; on February 25, 1931, \$500.00; on August

15, 1931, they paid \$500.00; on September 15, 1931, they

paid \$500.00; on October 15, 1931, they paid \$500.00; on

November 15, 1931, they paid \$500.00; on December 15, 1931,

they paid \$500.00; on January 15, 1932, they paid \$500.00; on

February 15, 1932, they paid \$500.00; on March 15, 1932,

they paid \$500.00; on April 15, 1932, they paid \$500.00; on

fendant on October 16, 1923, to one Siegel. He testified that he had no knowledge of the defendant in connection with the purchase of these lots, but that he negotiated for their purchase through one Williams, "who represented Mr. Collins," and that when he paid the consideration for these lots, which was \$4,000, and received his deed conveying the title to him, the deed was signed by the defendant. We are not advised by any testimony in the record who Mr. Collins was. Presumably, he was a real estate man, for the lots in question were located in Block 1, in "Collins & Gauntlet's Francisco Ave. Sub-division." Later, but the record does not disclose just when, the plaintiffs apparently discovered what had taken place, and on March 10, 1924, they tendered in currency to the defendant the amount which they claimed was remaining due him from them under the terms of the contract, and the defendant refused the tender, without specifying any ground for the refusal, but merely saying - according to the testimony in the record - that he had "nothing to do with it." Subsequently, the plaintiffs instituted this action against the defendant. So far as the record shows this contract made no provision with regard to the time when the plaintiffs were to receive their deed, nor does it appear who was in possession of the property.

In support of the judgment, the defendant contends that the plaintiffs breached the contract by failing to pay the sum of \$12.00 or more on the eleventh day of each and every month, and also by their failure to pay the second installment of a special assessment which became due in

...the fact that the defendant was not a member of the ... the fact that the defendant was not a member of the ... the fact that the defendant was not a member of the ...

January 1923, and which was paid under date of October 16, 1923, the date of the sale to Riegel, the receipt for this payment being issued to Collins & Gauntlett. While the last payment made by the plaintiffs toward the purchase price under the contract was in October 1922, a year prior to the sale to Riegel, they could be said to be in default at the time of the sale to Riegel, in only a small amount, so far as those payments are concerned. The total payments made by the plaintiffs toward the purchase price, beyond the initial payment of \$178.00, amounted to \$422.00. If the plaintiffs had paid \$12.00 on the eleventh day of each and every month after the execution of the contract they would have been required to pay under the terms of the contract an aggregate of \$432.00, during the period up to October 11, 1923, - \$10.00 more than they did pay. This disregards the interest they should have paid under the terms of the contract. But it is clear from the evidence in the record that the dates of the payments called for by the contract had been entirely disregarded so far as the plaintiffs were concerned, and that this had been entirely acquiesced in by the defendant. The defendant contends that the fact that he accepted more than \$12.00 in the case of each of the payments made, could not possibly mislead the plaintiffs into the belief that they were not required to pay the installment of \$12.00 per month called for by the contract on the eleventh day of each and every month. In our opinion that does not go to the point involved. The fact that in no month following the first month of the contract period was a payment made by the plaintiffs on the

January 1933, and which was paid under date of October 19, 1933, the date of the sale to Hight, the proceeds for this payment being turned to William S. Hight. While the last payment made by the plaintiff toward the purchase price under the contract was in October 1933, a year prior to the sale to Hight, they would be said to be in default at the time of the sale to Hight, in only a small amount, so far as these payments are concerned. The total payments made by the plaintiff toward the purchase price, beyond the initial payment of \$100.00, amounted to \$121.25. If the plaintiff had paid \$12.50 on the eleventh day of each and every month after the execution of the contract they would have been required to pay under the terms of the contract an aggregate of \$125.00, during the period up to October 11, 1933, - \$12.50 more than they did pay. This discrepancy the plaintiff may have said under the terms of the contract. But it is clear that the evidence in the contract that the date of the payment called for by the contract had been entirely disregarded as far as the plaintiff was concerned, and that this had been entirely recognized in by the defendant. The defendant contends that the fact that he accepted more than \$12.50 in the sum of each of the payments made, could not possibly shield the plaintiff from the belief that they were not required to pay the installment of \$12.50 per month called for by the contract on the eleventh day of each and every month. In my opinion that fact goes to the point involved. The fact that it is months following the last month of the contract period was a payment made by the plaintiff on the

eleventh day of the month and that, the payments as they were made, were all received without comment or objection, would reasonably lead the plaintiffs to conclude that the requirements of the contract, with regard to the making of these payments, were being waived and that they were not going to be held to a strict compliance with the terms of the contract in that regard. It is the further contention of the defendant that having waited six months after title to the lots was conveyed to another, before making their tender, it must be presumed that the plaintiffs had waived any rights they had under the contract. In our opinion, that contention is untenable, on the evidence in this record, which fails to show when the plaintiffs discovered that these lots had been sold to someone else.

The defendant, having seen fit to waive strict compliance with the terms of the contract with regard to the making of these deferred payments by the plaintiffs, could not thereafter, without default by them after notice to the effect that he would in the future require a strict compliance in this regard, sell the property to others and thus put it out of his power to comply with the contract himself. Peck, et al v. Brighton Co., 69 Ill. 309; Heald v. Wright, et al, 75 Ill. 17; Thayer v. Meeker, 86 Ill. 470; Wardner v. Cornell, 105 Ill. 169; Thayer v. Star Mining Co., 105 Ill. 540; Watson v. White, 132 Ill. 364; Manson v. Bragdon, 159 Ill. 61; Easton v. Schneider, 185 Ill. 508; Hibernian Bank Assn. v. Bell & Zeller Coal Co., 181 Ill. App. 581; Jakes v. North American Union, 186 Ill. App. 1; Vider v. Ferguson, 88 Ill. App.

136. Some of these cases involved bills in equity, seeking a specific performance of the contracts there involved. Such a suit would be proper where the defendant vendor still had the property, but in the case at bar, after the defendant vendor had conveyed title to the property to another and thus placed it beyond his power to perform, an action at law for damages was the proper remedy. It is not shown that the plaintiffs failed to comply with any of the terms of the contract, except with regard to those requirements, the strict performance of which the defendant had waived. Where both parties to the contract calling for the delivery of goods or the conveyance of property by one of the parties, upon the completion of certain payments on designated dates by the other party, are continuing to treat the contract as in force, either party suing the other for damages caused by an alleged breach of the terms of the contract, will be required to show that he himself has fulfilled all the conditions called for under the contract on his part. That situation was before this court in Brown Coal Co. v. Cartersville Washed Coal Co., 221 Ill. 659. But where, although the contract provides that time shall be of its essence, the parties, by their course of dealing, interpret their obligations to the contrary, - the vendor accepting payments after the dates called for by the contract, without complaint, - his conduct will be construed as amounting to a waiver of the right to repudiate the contract or of the right to require strict performance on the part of the vendee as to payments, as a condition precedent to the fulfillment of the seller's obligations or as to a

condition precedent to the right of the buyer to sue the seller for damages for the breach by the latter in repudiating the contract entirely. Such was the situation presented in Fitch & Co. v. New Ohio Washed Coal Co., 156 Ill. App. 589. A similar situation was involved in Vider v. Ferguson, supra, which was a case involving the sale of real estate. The propositions of law which the court refused to hold were to that effect and it was error to refuse them. However, they serve no purpose in this court. P. C. & St. L. Ry. Co. v. Chicago City Ry. Co., 300 Ill. 162; Gohn v. Armstrong Tire and Vulcanizing Co., 223 Ill. App. 572; Brown v. Atwood, 224 Ill. App. 77. We have examined the cases relied upon by the defendant in contending the contrary, but they are not at all in point, being to the effect that an option without consideration is a mere offer which may be withdrawn at any time, without notice. These plaintiffs were not given an option to buy this property, but the defendant entered into a binding contract of sale with them. Even though they were in default to some extent the defendant was not in a position, without giving them a reasonable opportunity to comply with the terms of the contract, as to the payments, to sell the property to someone else, in view of what had taken place, amounting, as we hold, to a waiver of such strict compliance. This applies not only to the payments due under the contract on the purchase price but to the second installment of the special assessments which fall due in January 1923, for there had also been postponement in the payment of the first installment, - so far as the record shows, without

condition precedent to the right of the buyer to sue the
seller for damages for the breach by the latter in repudiating
the contract entirely. Such was the situation presented
in Little v. New York Central R.R. Co., 188 Ill. App. 280.
A similar situation was involved in Little v. Little, 288 Ill.
which was a case involving the sale of real estate. The pre-
sumption of law which the courts refused to hold was to
that effect and it was error to refuse them. However, that
error no longer exists in this court. Little v. Little, 288 Ill.
Little v. Little, 288 Ill. App. 280. Little v. Little, 288 Ill.
App. 280. We have examined the cases relied upon by the
defendant in contesting the contract, but they are not of
all points, being to the effect that an option without
consideration is a mere offer which may be withdrawn at any
time, without notice. These plaintiffs were not given
an option to buy this property, but the defendant entered
into a binding contract of sale with them. Even though they
were in default to some extent the defendant was not in a
position without giving them a reasonable opportunity to
comply with the terms of the contract, as to the payment, to
sell the property to someone else, in view of what had taken
place, amounting, as we hold, to a revival of such offer
agreement. This applies not only to the payment due under
the contract on the payment plan but to the second instal-
ment of the second instalment which fell due in January
1931, the date had also been postponed in January of
the first instalment - so far as the record shows, without

any complaint from the defendant. When this second installment was paid at the time these lots were sold to Riegel, it may not be said, from any evidence that appears in this record, that such payment was in behalf of this defendant.

In the course of the trial the plaintiffs introduced evidence tending to show the fair cash market value of these lots at the time they were conveyed to Riegel in October, 1923. That evidence was immaterial. The plaintiffs are not contending that the lots were sold to Riegel for less than they were worth. Therefore, the important question is not what were the lots worth but what was the amount paid for them by Riegel and received by the defendant.

Where the purchaser has made payments on account of the purchase price, and the seller has defaulted by conveying the property to another and no contention is made that the selling price is less than the market value, the proper measure of damages, caused by the failure of the seller to fulfill the contract, is the difference between the selling price to such third party, and so much of the contract price as remains unpaid. Williston on Contracts, Vol. 3, Sec. 1398. The plaintiffs' contention as to the proper measure of damages, however, amounts to the same thing, namely, that they are entitled to the difference between such selling price to the third party, and the contract price, plus all the payments they had made. In order to determine these damages it is necessary to take into con-

any connection with the defendant. When this second letter is
sent was held at the time these facts were said to be
it may not be said, from any evidence that appears in this
record, that such payment was in receipt of this defendant.

In the course of the trial the plaintiff's intro-
duced evidence tending to show the fact such matters being
of these facts at the time they were conveyed to Haged in
February, 1907. That evidence was introduced. The plain-
tiff is not contending that the facts were said to Haged
for less than their true value. That, however, the defendant
question is not what were the facts worth but what was the
amount paid for them by Haged and received by the defendant.

Where the defendant has made payment on account
of the defendant's debt, and the plaintiff has introduced in evi-
dence the receipt in payment and an admission is made
that the selling price is less than the actual value, the
value of the defendant's property, caused by the failure of the
plaintiff to fulfill the contract, in the difference between
the selling price to such third party, and the value of the
property as it remains unpaid. Plaintiff in substance
Feb. 1, 1907. The plaintiff's contention as to the
plaintiff's failure to fulfill the contract, however, amounts to the same thing
namely, that the plaintiff failed to fulfill the contract
and selling price to the third party, and the defendant
paid, that all agreements they had made. In order to
determine their dispute it is necessary to find out

sideration not only the amount remaining due from the plaintiffs to the defendant on the purchase price, or the aggregate amount they had paid on the purchase price, but there must also be taken into consideration all taxes and special assessments and also the matter of interest. It is not possible to accurately determine those elements in the damages, from the evidence in this record, and for that reason we are of the opinion that we are not in a position to fix the plaintiffs' damages and enter judgment in this court.

For the reasons stated, the judgment of the Municipal Court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views herein set forth.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

situation not only the amount remaining due from the
debtor to the creditor on the purchase price, but the
amount they had paid on the purchase price, but
there must also be taken into consideration all taxes and
costs assessments and also the matter of interest. It
is not possible to accurately determine these elements
in the manner, from the evidence in this record, and for
that reason we are of the opinion that we are not in a posi-
tion to fix the plaintiff's damages and enter judgment in this

case.

For the reasons stated, the judgment of the
court is reversed and the cause is remanded
to that court for further proceedings not inconsistent

with the above stated law.

WILLIAM W. RICHMOND AND GEORGE B. RICHMOND,

ATTORNEYS AT LAW, ST. LOUIS, MO.

154 - 30413

CONRENAY BARBER,

Appellee,

v.

GENERAL AUTOMOTIVE CORPORATION,
a corp.,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 605

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

By this appeal the defendant corporation seeks to reverse a judgment for \$6,850.20, recovered against it by the plaintiff Barber, in the Circuit Court of Cook County. The issues were tried before a jury and at the close of all the evidence the court instructed the jury to find the issues for the plaintiff. A verdict was returned accordingly, assessing the plaintiff's damages at the amount for which the judgment was then rendered.

The note sued upon in this case is one of a series of three, on which the plaintiff brought separate actions, the other two being involved in cases #30279 and #30843, in which we are this day filing opinions. The evidence appearing in the case at bar is somewhat more full than that appearing in the record in case #30279. The note involved in the case at bar was dated February 5, 1924, (as were all of the notes in this series,) and was due November 1, 1924. As in the case of the other notes, it was executed by the defendant corporation and drawn to the

241 I.A. 605

Opinion filed March 10, 1936.

THE FOLLOWING QUESTION WAS SUBMITTED TO THE

COURT OF THE DISTRICT OF COLUMBIA:

IT IS REQUESTED THAT THE COURT ADVISE THE

COMMISSIONER OF THE DISTRICT OF COLUMBIA

AS TO THE VALIDITY OF THE ORDER OF THE

COMMISSIONER OF THE DISTRICT OF COLUMBIA

IN REFUSING TO GRANT A WRIT OF HABEAS

CORPUS TO THE PETITIONER.

THE PETITIONER ALLEGES THAT THE ORDER

IS UNLAWFUL AND THAT HE IS ENTITLED TO

THE WRIT OF HABEAS CORPUS.

THE PETITIONER ALLEGES THAT HE IS

ENTITLED TO THE WRIT OF HABEAS CORPUS

BECAUSE HE IS DETAINED WITHOUT

LEGAL CAUSE AND THAT HE IS ENTITLED

TO THE WRIT OF HABEAS CORPUS.

THE PETITIONER ALLEGES THAT HE IS

ENTITLED TO THE WRIT OF HABEAS CORPUS

BECAUSE HE IS DETAINED WITHOUT

LEGAL CAUSE AND THAT HE IS ENTITLED

order of "Harvey S. and Chas. A. Pardee" and endorsed by these two payees in blank. The plaintiff testified that he received this note from the two Pardees on August 28, 1924.

When the plaintiff had submitted his prima facie proof and rested, he was recalled as a witness for the defendant, and he then testified that the note here sued upon was given him by the Pardees as collateral to their personal notes which he held and which they had given him in connection with an indebtedness of \$12,000, which they owed him for money furnished by him in paying premiums on policies of life insurance which had been issued to the two Pardees. Counsel for the defendant then asked the witness if it was not a fact that this debt of the Pardees to him was paid by them after he took this note of the defendant as collateral security, and he said it had not been. Counsel then asked him whether it was not a fact that he had testified to the contrary several months previously, in connection with the trial of case #30278, (in this court) and an objection interposed, was sustained. In our opinion this objection should have been overruled. While counsel could not impeach his own witness, he had the right to probe his conscience by asking the question here objected to, although it is true he would have been bound by the answer given. Girdgus v. Van Etten, 211 Ill. App. 524, and cases there cited. The plaintiff was then asked to produce a warranty deed which he had received from the Pardees after taking the note in suit as collateral security, in which deed the Pardees had conveyed certain real estate to him, and he did so, whereupon the deed was received in evidence.

order of January 11 and March 1, 1900, and returned by
those two papers in black. The plaintiff testified that
he received this note from the two papers on August 11,

1901.

When the plaintiff had submitted his written testimony

quest and needed, he was recalled as a witness for the
defendant, and he then testified that the note was made
upon was given him by the persons or persons or their
personal notes which he held and which they had given him
in connection with an indebtedness of \$12,000, which they
owed him for money furnished by him in paying premiums on
policy of life insurance which had been issued to the two
persons. Counsel for the defendant then asked the witness
if it was not a fact that this date of the writing to him
was said by them when he took this note of the defendant
on defendant's account, and he said it had not been.
and then asked him whether it was not a fact that he had
testified to the contrary several months previously, in
connection with the trial of case No. 10,000, (in this court)
and on question answered, was contained. In my opinion
this question should have been overruled. While counsel
asked the witness, he was allowed, he had the right to
ask the witness to answer the question here objected
to. It seems to me that he would have been bound by the
answer given. Plaintiff's testimony was then called to produce
these three notes. The plaintiff was then asked to produce
a writing which he had received from the persons after
they had been called to the witness stand, and he said
that he had not received any such writing, and he said
that the persons had received notes which were to him,
and he said that he had received the notes from the persons.

This deed is a straight warranty deed from the two Pardees and their wives, to the plaintiff, conveying certain real property therein described, located in Highland Park, subject to two trust deeds. This deed was dated September 30, 1924, and bears a \$30 revenue stamp. The court asked the witness if this deed was taken by him as a mortgage and he said it was. Counsel for the defendant then asked him if he was aware of the significance of the revenue stamp attached to the deed, and objection to that question was sustained. Counsel then asked the plaintiff if it was not a fact, "that when you received this deed you surrendered to the Pardees all the notes which they owed you," and he answered that he did.

This witness testifying for the defendant further, stated that he had a conversation with one Kingsley, of the defendant company, about August 1, 1924, in relation to the payment of the first of the three notes which he held and which was due at that time (the note involved in case #30272) and that at that time he did not hold the note sued upon in this case and did not acquire it until nearly a month later. He was asked whether Mr. Kingsley said anything to him in that conversation to the effect that the Pardees were indebted to the defendant corporation, and he said he did not recall any such conversation. This question was then asked: "Didn't he tell you that the Pardees were indebted to the corporation and for that reason were no longer connected with the company?" and he answered, "I may have known that anyway." Following that, he was asked if he did know it when he took the note in suit, on August 28th, and he said he did not. On cross-examination of this witness

This deed in a certain manner was done from the two persons and their wives, in the plaintiff's company, in certain real property therein described, located in Highland Park, Washington, D.C. This deed was dated September 20, 1900, and bore a \$20 revenue stamp. The court asked the witness if this deed was taken by him as a mortgage and he said it was. Counsel for the defendant then asked him if he was aware of the illegality of the revenue stamp attached to the deed, and the witness answered that he was not. Counsel then asked the plaintiff if it was not a fact, "that when you received this deed you understood to the best of all the facts that they owed you," and he answered that he did.

This witness is willing for the defendant further to state that he had a conversation with one Langley, at the defendant's company, about August 1, 1900, in relation to the payment of the first of the three notes which he held and which was due at that time (the note involved in case 10000) and that at that time he did not hold the note and upon in this case and did not receive it until nearly a month later. He was asked whether Mr. Langley said anything to him in that conversation to the effect that the defendant was indebted to the bank and corporation, and he said he did not recall any such conversation. This question was then asked: "Didn't he tell you that the defendant was indebted to the corporation and for that reason was no longer connected with the company?" and he answered, "I may have heard that report." Following that, he was asked if he did not then go back the same in with one August 1900, and he said he did not. On cross-examination of this witness

by his own counsel, he testified that at his conversation with Kingsley, the latter told him that these notes had been "given to the Pardees for moneys that were turned over by the Pardees to the corporation from a mortgage on the (Highland Park) property, and these notes were to be paid when they were due, thus enabling the Pardees to repay the mortgage," on which the Pardees had raised the money they had turned over to the corporation; and that these notes were given for the repayment of the mortgage, but instead of that, they had come into the possession of the witness.

Counsel for the defendant then called Kingsley to the witness stand and he testified that he was Vice-president and general manager of the defendant company at the time of his conversation with the plaintiff, about August 1, 1924; that upon that occasion he had called at Mr. Barber's office to see what could be done in the matter of arrangements for an extension of the note which was then about due. This witness further testified that he told Barber that the company was not in a position to pay that note but that they probably could take care of it if an extension were granted; that Barber then asked him about the condition of the defendant company and he told Barber that it was in very bad condition, because the Pardees had used in excess of \$100,000 of its money, with the result that it was not in a position to pay its debts; that the plaintiff told him he had spent a lot of time wondering what he should do about it; (apparently referring to the payment by the Pardees of their indebtedness to him,) and that he (the witness) advised the plaintiff to protect himself if he could, but that he did not know how he could

that they had come into the possession of the witness, given for the recovery of the mortgage, but refused to turn over to the corporation; and that these notes were "arranged" in which the Foreman had raised the money they had when they were lost, thus enabling the Foreman to repay the (Holland Park) property, and these notes were to be sold over by the Foreman to the corporation from a mortgage on the same "given to the Foreman for money that were turned when Hingway, the Foreman told him that these notes had by him were turned, he recalled that at his recollection.

Journal for the defendant then called Kingfisher to the witness stand and he testified that he was witness to the time of the conversation with the plaintiff, about August 1, 1935; that upon that occasion he had called on the plaintiff's office to see what would be done in the matter of compensation for an extension of the note which was then in issue. This witness further testified that he told Kingfisher that the company was not in a position to pay that note but that they probably would take care of it in some other way; that he then stated that he had called the attention of the defendant company and he told Kingfisher that it was in very bad condition, because the taxpayer had paid in excess of \$100,000 in its money, with the result that it was not in a position to pay the debt; that the plaintiff told him he had agent a lot of time working and he would be glad if he would investigate the matter by the Bureau of Social Investigation in 1935, and that he (the witness) carried the plaintiff to court.

accomplish it inasmuch as they (the Pardees) had bought the (Highland Park) property with the company's money; that he told Mr. Barber that he did not want him to take those other notes over, - "that is the thing we objected to very strongly;" that Barber replied that "he realized that, but he thought their intentions were good and he was going to try to protect himself if he possibly could."

At this point in the examination of the witness Kingsley, three letters were produced, one dated August 28, 1924, from the plaintiff to the defendant, another dated September 13, 1924, from the plaintiff to the defendant, and the other dated September 16, 1924, from the defendant to the plaintiff. After the witness was permitted to testify that certain statements in these letters referred to the note in suit, the objection of the plaintiff to the defendant's offer of the letters was sustained. The letter last referred to, being the one from the defendant to the plaintiff under date of September 16, 1924, is the letter referred to in the opinion we are filing in case #30378, the letter there having been offered in evidence by the plaintiff and received without objection. This letter, when offered by the defendant, was subject to the objection interposed by the plaintiff, as it contained nothing material beyond a self-serving declaration on the part of the defendant. This, however, was not urged as a ground for the objection made. The other two letters were, in our opinion, not material, except as to a statement contained in one of them, tending to impeach the plaintiff. This, however, referred to some testimony the plaintiff had given while on the stand

...it is immaterial to the question of the validity of the assignment of the patent rights in the invention, whether the assignor was at the time of the assignment a citizen of the United States or not. The fact that the assignor was a foreigner at the time of the assignment does not prevent the assignment from being valid. The only question is whether the assignor was at the time of the assignment the owner of the patent rights in the invention. If he was, the assignment is valid, and the assignee becomes the owner of the patent rights in the invention. If he was not, the assignment is invalid, and the patent rights in the invention remain with the assignor. In the case of the patent rights in the invention, the assignor was at the time of the assignment the owner of the patent rights in the invention. Therefore, the assignment is valid, and the assignee becomes the owner of the patent rights in the invention.

as a witness for the defendant, so counsel was attempting to impeach his own witness. No probing of conscience is involved here as there was in connection with the evidence previously referred to.

Counsel for the plaintiff asked Kingsley, on cross-examination, if it wasn't a fact that any money which the Fardees might have owed in August 1924, was owed not to the defendant but to Miller & Fardee, Incorporated, and the witness answered that he considered it was owed to both, that company and the defendant. He was asked if he had not told Barber, in the conversation referred to, that the money was owed to Miller & Fardee, Incorporated, and he said he did not know - that inasmuch as these companies were generally related, it did not occur to him to distinguish between them as "they belonged to the same crowd;" that he would not say whether he told the plaintiff that the indebtedness owed by the Fardees was to the defendant.

On redirect examination this witness stated that he did not tell Barber exactly how much the Fardees owed the company for he did not know himself at that time. The court then asked the witness: "Did you tell Mr. Barber that they owed the company any money at that time? and he answered: "I told him they owed over \$100,000 which they had taken out of the company funds." He further testified that at that time the defendant company was owned by Miller & Fardee, Incorporated, or substantially so; that they were "practically one company."

Counsel for the defendant called one Williams to the stand, who testified that he was an accountant. Counsel

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as a witness for the defendant, as counsel was attempting to impeach his own witness. No proof of connection in involved here as there was in connection with the evidence previously referred to.

Counsel for the plaintiff asked Langley, an witness, if it wasn't a fact that any money which the witness might have owed in August 1934, was owed not to the defendant but to William A. Barker, imprisoned, and the witness answered that he considered it was owed to Barker. Counsel and the defendant. He was asked if he had not told Barker, in the conversation referred to, that the money was owed to William A. Barker, imprisoned, and he said he did not know - that indeed as these conversations were generally referred, it did not seem to him in this conversation that he "they belonged to the same money" that he would not say whether he told the plaintiff that the indebtedness was to the father or to the defendant.

The plaintiff's examination of this witness stated that he did not tell Barker exactly how much the father owed the company for he did not know himself at that time. The court then asked the witness: "Did you tell Mr. Barker that they owed the company any money at that time?" and he answered: "I told him they owed over \$100,000 which they had taken out of the company funds." He further testified that he had told the defendant company was owed to William A. Barker, imprisoned, as much as \$100,000 and that he was not sure.

Counsel for the defendant asked the witness if the money was \$100,000 that he was in connection with the

then asked him whether he had made an examination of the books of the defendant company to ascertain the amount of the indebtedness of the Pardees to it, as of June 14, 1934, and also as of August 1, 1934. Objections to those questions were sustained. In our opinion, that ruling was erroneous. The question of whether the Pardees were in fact indebted to the defendant was a proper subject of inquiry. The objections interposed to these questions were general. The questions were apparently preliminary to further inquiry as to the subject-matter of the indebtedness of the Pardees to the defendant. The dates referred to in these two questions perhaps had no significance, but, if in fact the Pardees were indebted to the defendant, it would have some bearing on the question of whether the defendant was liable to the plaintiff in this action.

The question of law presented in case #30879 is, in our opinion, also involved in the case at bar. It is true that a part of the evidence on the question of whether the indebtedness of the Pardees to the plaintiff was liquidated after the plaintiff received from them, as collateral security on their notes, the note of the defendant here sued upon, was the statement of the plaintiff, while testifying as a witness for the defendant, to the effect that they were not. But it also appears from the record in the case at bar that the witness then produced the warranty deed of the Pardees, conveying the Highland Park property to him; and then the record contains the admission by the witness that when he received this deed from the Pardees, he surrendered to them all the notes which they owed him. One of the issues of fact pre-

sented in this case was whether the Pardees were indebted to the defendant for moneys they had withdrawn from that corporation at the time they were connected with it. On the evidence to which we have referred, we are of the opinion that the defendant was entitled to have that question submitted to the jury, under proper instructions, and the trial court, therefore, erred in giving the jury a peremptory instruction for the plaintiff.

As pointed out in the opinion filed in case #30279, although these three cases are upon three notes, between the same parties, brought by the same plaintiff against the same defendant, the records in the three cases are not all alike and we are obliged to determine the issues presented in each case on the record in that case and without reference to those in the other cases. While the parties have joined in a motion for leave to file consolidated briefs covering all three cases, and while references are made in these briefs to all the cases promiscuously, this does not permit us to consider the records of all of them in connection with each of them. If this court had appreciated the difference in these records, the motion for leave to file consolidated briefs would have been denied.

As in case #30279, motions were made in the case at bar by the appellee to strike the appellant's reply brief from the files and to assess statutory damages, in affirming the judgment, because it is alleged that it is apparent that the appeal was prosecuted solely for the purpose of delay, and those motions were reserved to the hearing. Both motions are now denied.

...in this case was whether the witness was ...
...the witness for ...
...at the time they were connected with it. ...
...to which we have referred, we are of the opinion that the
...was entitled to have that question submitted to the
...jury, under proper instructions, and the trial court, therefore,
...in giving the jury a supplementary instruction for the
...mistake.

As pointed out in the opinion filed in case 19075,
...although these three cases are upon three matters, between the
...same parties, brought by the same plaintiff against the same
...defendant, the records in the three cases are not all alike
...and we are obliged to determine the issues presented in each
...case on the record in that case and without reference to those
...in the other cases. While the parties have joined in a motion
...for leave to file consolidated briefs covering all three cases,
...and while references are made in those briefs to all the cases
...collectively, this does not permit us to consider the records
...of all in connection with each of them. If this court
...had considered the evidence in these cases, the result for
...them is not necessarily identical with that reached.

It is respectfully submitted that it is the duty
...of each of the parties to state the issues which arise
...from the facts and to present satisfactory evidence in establishing
...the judgment, because it is alleged that it is important that
...the court be presented solely for the purpose of delay, and
...that evidence be presented to the jury. Such action is

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For the reasons we have given, the judgment of the Circuit Court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views expressed in this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'DONNOR, JJ. CONCUR.

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168 - 30427

ELLIS H. HENRY,

Appellant,

v.

ALBERT C. SPRAGUE, Commissioner
of Public Works of Chicago,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 606

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

Ellis H. Henry filed a petition for a writ of mandamus on January 26, 1925, in which he set forth that in 1916 he took the Civil Service examination for a position in the Classified Civil Service in the City of Chicago, then known as General Foreman of Construction Laborers, as a result of which his name was included upon the eligible list for such position; that later the Commissioner of Public Works requested the Commission to certify the name and address of the one entitled by law to be appointed to the position, which was then vacant, whereupon the Commission certified the name of the petitioner as the one being entitled to the appointment, and he was duly appointed and entered upon the performance of his duties; that thereafter he was illegally discharged from said position without cause. Other allegations are contained in this petition which it will not be necessary for us to set forth here, as they are not involved in the decision of this appeal. The petition alleged that the defendant Sprague was the Commissioner of Public Works of the

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City of Chicago; that the said petitioner had demanded of the said Sprague, that he reinstate him in his said position and restore his name upon the payrolls of the department and cause to be paid to him the salary or wages appropriated for the position, but that the defendant refused so to do. Amendments thereafter filed to the petition set up the various annual appropriation ordinances, showing appropriations made for the position in question. The prayer of the petitioner was to the effect that the court issue a writ of mandamus, directed to the said Sprague, "commanding him that he do forthwith restore the petitioner to the position aforesaid, and cause his name to be placed on the payroll of said Department, as of the date of his pretended 'lay off' as aforesaid;" and further commanding the members of the Civil Service Commission of the City of Chicago, who were also made respondents, to place petitioner's name on the eligible list of the Department of Public Works of the City of Chicago, as being legally entitled "as of the date of his pretended 'lay off' as aforesaid, thence, hitherto" to hold the position in question.

The record shows that the Corporation Counsel of the City of Chicago, for the parties respondent, filed a general demurrer to the petition which the court overruled, and as the respondents stood by their demurrer, the court entered judgment that the petition be taken as confessed and that a peremptory writ of mandamus issue, directing the respondent Sprague, as Commissioner of Public Works of the City of Chicago, to restore the petitioner, Ellis S. Henry,

to the position of Foreman of Construction Laborers, as of February 1, 1932, for the period ending December 31, 1932, and to the position of Construction Foreman, as of January 1, 1933, "and thence forward; and to cause the name of said petitioner to be placed upon the payrolls of said Department of Public Works" for the same periods and under the respective titles above referred to. This order also included the relief prayed for by the petitioner, as against the members of the Civil Service Commission. However, that part of the judgment is not involved here. It appears further from the record that a writ of mandamus, pursuant to this judgment, was issued, commanding the said respondent Sprague to do as provided by the court in its judgment order as above set forth. Counsel for respondents endorsed this writ, to the effect that the court had jurisdiction to enter the judgment order upon which the writ was based; that he could find no error on the face of the record; that although time for the taking of an appeal had not expired, no appeal would be taken; and therefore, in his opinion the judgment was final and the City could not effectually appeal from it, or sue out a writ of error to review it; and that the judgment consisted of a mandate to restore the petitioner to his Civil Service position, as stated in the order.

Under date of June 18, 1935, the petitioner Henry S. Ellis filed a further petition against the respondent Sprague, for a rule to show cause why he should not be adjudged in contempt of court for failure to pay him his back salary, and in that petition he set forth the judgment order which the court had originally entered in the mandamus proceedings and the writ which had been issued

pursuant thereto, containing the endorsement of the Corporation Counsel above noted, said writ being issued on April 2, 1935. In this petition to show cause the petitioner further set forth a communication from his counsel addressed to the said respondent Sprague, under date of May 25, 1935, in which letter, after setting forth the terms of the judgment order and the writ, the petitioner's counsel called attention of respondent to the fact that the writ or mandate was retroactive and did not take effect merely from the date of the judgment order, and stated that this meant that petitioner had been unlawfully discharged on or about February 1, 1932, and had unlawfully been kept out of his position ever since; and that he was entitled to the salary pertaining to his position, which had accrued ever since said unlawful discharge; and complaint was made of the fact that petitioner had not received said back pay. After quoting this letter in full in the petition, petitioner further set forth that the respondent Sprague had refused to comply with the judgment order and writ, saying in explanation of such refusal that he had been advised by his attorneys not to comply with the judgment and writ, because to reinstate petitioner upon the City payrolls retroactively, so as to entitle him to back salary, would be impracticable; that the order of the court calling for such retroactive proceedings was not legally operative and that the salary for the periods prior to the entry of the judgment had already been paid out by the City Officials to another person who had been discharging the duties of the office or position in question since petitioner's original discharge therefrom.

The following is a list of the names of the persons who have been arrested in connection with the above mentioned case, together with the date of their arrest and the place where they were arrested:

Name	Date of Arrest	Place of Arrest
John Doe	1912	New York
Jane Smith	1912	New York
Robert Brown	1912	New York
Mary White	1912	New York
Charles Black	1912	New York
William Green	1912	New York
Elizabeth Gray	1912	New York
Thomas Pink	1912	New York
James Blue	1912	New York
Anna Yellow	1912	New York
George Purple	1912	New York
Patricia Red	1912	New York
Richard Orange	1912	New York
Sarah Green	1912	New York
Benjamin White	1912	New York
Rebecca Black	1912	New York
Samuel Gray	1912	New York
Lucy Pink	1912	New York
David Blue	1912	New York
Helen Yellow	1912	New York
Frank Purple	1912	New York
Evelyn Red	1912	New York
Albert Orange	1912	New York
Grace Green	1912	New York
Harold White	1912	New York
Joseph Black	1912	New York
Marion Gray	1912	New York
Clarence Pink	1912	New York
Walter Blue	1912	New York
Beatrice Yellow	1912	New York
Carl Purple	1912	New York
Esther Red	1912	New York
Herbert Orange	1912	New York
Norma Green	1912	New York
Samuel White	1912	New York
Theresa Black	1912	New York
Victor Gray	1912	New York
Willie Pink	1912	New York
Yvonne Blue	1912	New York
Zoe Yellow	1912	New York
Adam Purple	1912	New York
Betty Red	1912	New York
Clifford Orange	1912	New York
Dorothy Green	1912	New York
Edward White	1912	New York
Florence Black	1912	New York
Gerald Gray	1912	New York
Helen Pink	1912	New York
Irving Blue	1912	New York
Jessie Yellow	1912	New York
Kenneth Purple	1912	New York
Lillian Red	1912	New York
Martin Orange	1912	New York
Nancy Green	1912	New York
Oscar White	1912	New York
Pamela Black	1912	New York
Quentin Gray	1912	New York
Ruth Pink	1912	New York
Stanley Blue	1912	New York
Teresa Yellow	1912	New York
Ulysses Purple	1912	New York
Vernon Red	1912	New York
Wanda Orange	1912	New York
Xavier Green	1912	New York
Yvonne White	1912	New York
Zoe Black	1912	New York
Adam Gray	1912	New York
Betty Pink	1912	New York
Clifford Blue	1912	New York
Dorothy Yellow	1912	New York
Edward Purple	1912	New York
Florence Red	1912	New York
Gerald Orange	1912	New York
Helen Green	1912	New York
Irving White	1912	New York
Jessie Black	1912	New York
Kenneth Gray	1912	New York
Lillian Pink	1912	New York
Martin Blue	1912	New York
Nancy Yellow	1912	New York
Oscar Purple	1912	New York
Pamela Red	1912	New York
Quentin Orange	1912	New York
Ruth Green	1912	New York
Stanley White	1912	New York
Teresa Black	1912	New York
Ulysses Gray	1912	New York
Vernon Pink	1912	New York
Wanda Blue	1912	New York
Xavier Yellow	1912	New York
Yvonne Purple	1912	New York
Zoe Red	1912	New York
Adam Orange	1912	New York
Betty Green	1912	New York
Clifford White	1912	New York
Dorothy Black	1912	New York
Edward Gray	1912	New York
Florence Pink	1912	New York
Gerald Blue	1912	New York
Helen Yellow	1912	New York
Irving Purple	1912	New York
Jessie Red	1912	New York
Kenneth Orange	1912	New York
Lillian Green	1912	New York
Martin White	1912	New York
Nancy Black	1912	New York
Oscar Gray	1912	New York
Pamela Pink	1912	New York
Quentin Blue	1912	New York
Ruth Yellow	1912	New York
Stanley Purple	1912	New York
Teresa Red	1912	New York
Ulysses Orange	1912	New York
Vernon Green	1912	New York
Wanda White	1912	New York
Xavier Black	1912	New York
Yvonne Gray	1912	New York
Zoe Pink	1912	New York
Adam Blue	1912	New York
Betty Yellow	1912	New York
Clifford Purple	1912	New York
Dorothy Red	1912	New York
Edward Orange	1912	New York

Following this, the petition contains considerable in the way of argument, in answer to the position petitioner states he had been advised had been assumed by the respondent Sprague. Also, in this petition the petitioner alleges that the respondent Sprague has further violated the judgment and writ of the court in that although it was the duty of the Construction Foreman to supervise and direct the work and conduct of day laborers in subordinate employment upon the construction work upon which they were engaged; and although such foreman is held responsible for the work of such subordinates, and in order that he may efficiently discharge his duties in his said office or position, it is necessary that he be empowered to give directions and enforce them when given, and make reasonable use of his own discretion, yet, the petitioner, "ever since his recent reinstatement as Construction Foreman" has been kept subject to the authority of one Gersak, who was the person who had been illegally appointed as his successor and who had been caused by "the officials in defendant's Department who have immediate charge of such matters," to be appointed temporarily to an office or position entitled "Acting Assistant Engineer" and that these officials had delivered a written communication to petitioner, addressed to said Gersak, as Acting Assistant Engineer, dated April 6, 1925, (four days after the writ of mandamus was issued) in which Gersak was directed to assign petitioner "as Construction Foreman at \$300. per month and give Mr. Henry charge of such branch of the work as you may elect. As stated verbally, Mr. Henry will be carried under the above title and compensation from the beginning of the

Following this, the petition containing statements in the
way of argument, in answer to the several positions upon
which the respondent has been assumed by the respondent
throughout. Also, in this petition the petitioner alleges
that the respondent's actions have further violated the duty
owed and writ of the court in that although it was the duty
of the respondent to exercise its supervisory and direct the work
and conduct of day laborers in accordance with the laws upon
the construction work upon which they were engaged; and
although such persons are held responsible for the work of
such subcontractors, and in order that he may effectively dis-
charge the duties in his said office or position, it is nec-
essary that he be empowered to give directions and enforce
them upon others, and make responsible men of his own district.
But, yet, the petitioner, "over and above his recent assignment
and in construction work," has been left subject to the
authority of one person, who was the person who had been
illegally appointed as his successor and who had been caused
to be appointed in violation of the laws which have been made
"in charge of such matters," to be appointed temporarily to an
office or position entitled "acting assistant engineer" and
that these officials had delivered a written communication to
petitioner, addressed to said person, as acting assistant
engineer, dated April 6, 1905, (look also after the writ of
habeas corpus issued in which demand was directed to assign
petitioner as construction foreman at \$2000 per month and
that many changes of such persons of the work as they may
direct. As stated verbally, Mr. Henry will be carried under
the same rules and regulations from the beginning of the

current payroll period." The prayer of this petition to show cause was to the effect that the respondent Sprague, as Commissioner of Public Works of the City of Chicago, may be "required to show cause why he should not be punished for contempt of court for disobeying the aforesaid judgment and writ of this court." The Corporation Counsel of the City of Chicago on behalf of the said respondent Sprague, filed a general demurrer to the foregoing petition to show cause, which demurrer was sustained by the trial court, and the petitioner abiding by his said petition, it was ordered that the petition be dismissed. To reverse the order sustaining the demurrer of the respondent, to the petition to show cause, petitioner has perfected this appeal.

In our opinion, the petition to show cause was subject to the demurrer. The chief complaint of the petitioner is that respondent has failed to pay him his back salary covering the period after his alleged unlawful discharge on or about February 1, 1923. Petitioner alleges in his petition to show cause that the respondent Sprague has failed to do what he was directed and commanded to do by the court in the judgment order entered in the mandamus proceedings and in the writ which was issued pursuant to that order, namely, restore the petitioner to the position of Foreman of Construction laborers, as of February 1, 1923, and to the position of Construction Foreman as of January 1, 1923. The petitioner contends that to have restored him as directed by the court he would necessarily have to receive the salary attaching to his office or position, from and after the time he was discharged. In our

[illegible]

opinion, that contention is not tenable. In his petition for the issuance of a writ of mandamus the petitioner nowhere prays that he may be awarded his back salary, and neither in the judgment order in the mandamus proceeding nor in the writ issued pursuant thereto, is the respondent Sprague ordered to pay him such salary. The Commissioner of Public Works of a city does not pay salaries. The question of whether or not the petitioner had the right to ask for such back salary, in his petition for a writ of mandamus, is not involved. A judgment awarding the writ of mandamus to compel re-instatement in office, may, under proper circumstances, include a command to pay salary (The People v. Thompson, 316 Ill.11) and in view of the allegations in the petition for mandamus filed in the case at bar and the demurrer thereto, it would seem that the petitioner might be awarded his salary for the period of his illegal and unwarranted discharge. But the petitioner prayed for no such relief and it was not included in the judgment the court entered. The proper officials were not made parties defendant to make such relief appropriate in this case. A judgment merely directing the respondent to re-instate the petitioner as of the date of his discharge, will not require him to pay petitioner his salary or make respondent subject to answer to a rule to show cause, because the salary has not been paid. That the respondent Sprague has reinstated the petitioner to the position from which he contends he was unlawfully discharged and from which the demurrer admits he was unlawfully discharged, is apparent from the face of his petition to show cause, in which he refers to "his recent reinstatement," and in which he sets forth in full the letter of the respondent, which the petitioner alleges

was delivered to him for the purpose of accomplishing such reinstatement.

The petitioner having failed to ask for relief in his mandamus proceeding, in the way of payment in the matter of back salary, he may not inject that element into the case and try it out in connection with the subsequent petition for a rule to show cause. The effect of this petition to show cause is that the petitioner is asking the court to require the respondent to show cause why he should not be attached for contempt, by reason of his failure to pay the petitioner his back salary, in violation of a judgment in a mandamus proceeding which does not direct the respondent to so pay the petitioner, which judgment was entered pursuant to a petition in which the petitioner made no such request.

The question of whether, in reinstating the petitioner to his position, the Commissioner of Public Works properly placed him under the general authority of a certain Assistant Engineer, is likewise a matter which may not be tried out on a petition to show cause, following a mandamus proceeding in which that element was not in any way involved. Presumably, a Construction Foreman may properly be assigned to operate under a superior of some kind. The intimation made by the petitioner in his petition, to the effect that a Construction Foreman properly must "be his own boss" is, in our opinion, without merit.

For the reasons stated, the order of the Circuit Court sustaining the demurrer of the respondent to the petition to show cause, is affirmed.

ORDER AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

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[illegible]

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637

187 - 30448

CHARLES W. CARLSON and ALFRED C. LIDDELL, doing business as CHARLES W. CARLSON & COMPANY,

Appellants,

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

v.

NELLIE H. SIMS,

Appellee.

241 I.A. 606

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiffs, Charles W. Carlson and Alfred C. Liddell, brought this action against the defendant, Mrs. Sims, seeking to recover \$1750.00 which they claimed she owed them as a commission in payment of services they had rendered, in procuring a purchaser for some property which she owned. The issues joined were submitted to a jury and the jury made a finding for the defendant. Judgment was rendered on the verdict, and the plaintiffs appealed therefrom.

The evidence shows that the defendant's property was under lease to a number of different individuals and that for something less than a year, the plaintiffs had been her renting agents, collecting the rents as they came due and managing the property for the defendant. In December 1922, the defendant had some conversation with the plaintiffs about selling her property and she expressed a desire to have them find a purchaser if possible. Some time later they procured one Bernstein as a prospective purchaser. He and the

CHARLES E. GARDNER and others v.
JAMES E. GARDNER and others
JAMES E. GARDNER and others

Appellants

Appellees

OF THE COURT

V.

Appellees

JAMES E. GARDNER

241 I.A. 606

Appellants

Opinion filed March 10, 1936.

MR. JUSTICE THOMAS delivered the

opinion of the court.

The plaintiff, Charles E. Gardner and others

vs. the defendant, James E. Gardner and others.

The plaintiff is seeking to recover \$150.00 which they claim

was paid them as a commission on the sale of property

and to recover the balance of the commission for some property

which was sold. The issues joined were submitted to a

jury and the jury made a finding for the defendant. The

plaintiff has moved for a new trial, and the plaintiff

has moved for a new trial.

The plaintiff claims that the defendant's property

was taken from him by the defendant's property

and that the defendant's property was taken from him

and that the defendant's property was taken from him

and that the defendant's property was taken from him

and that the defendant's property was taken from him

and that the defendant's property was taken from him

and that the defendant's property was taken from him

and that the defendant's property was taken from him

defendant were brought together, and after some negotiations back and forth, a written contract was executed by the terms of which the defendant agreed to sell the property to Bornstein and his wife for \$75,500, and the Bornsteins agreed to buy at that price. The purchasers paid \$1,000.00 as earnest money upon the execution of this contract. This earnest money and the contract were placed in escrow with the Chicago Title & Trust Company, pending the carrying out of the deal. However, the transaction was never consummated and representatives of the two parties went to the offices of the Chicago Title & Trust Company and terminated the escrow, taking up the contract and the earnest money, \$400 of which was retained by the defendant to cover expenses to which she had been put (in supplying a guarantee policy, and so on) and \$600 of which was returned to the Bornsteins. This having been done and nothing having been paid to the plaintiffs, in the way of a commission, and their demand not being complied with, this action was brought by them against the defendant to collect the amount which they claimed was due them.

The plaintiffs contend that the defendant agreed to pay them the amount sued for as a commission if they procured a purchaser of her property, and that when they procured Bornstein, and the defendant entered into a written contract with him, they had earned their commission, as the act of the defendant in entering into the contract with Bornstein was an acceptance by her of the buyer they had procured, and that the defendant having

Statement was brought together, and other documents
from each was taken, a written contract was executed by
the terms of which the defendant agreed to sell the prop-
erty to Bernstein and his wife for \$75,000, and the
Bernstein agreed to pay at that price. The defendant
paid \$1,000.00 as earnest money upon the execution of
this contract. This earnest money and the contract were
placed in escrow with the Chicago Title & Trust Company.
Pending the carrying out of the deal. However, the trans-
action was never consummated and representative of the
two parties went to the office of the Chicago Title &
Trust Company and terminated the contract, taking up the
earnest and the earnest money, \$1,000.00 of which was now
taken by the defendant to cover expenses to which the
last party was (in carrying a business policy, and so on)
and \$500.00 of which was returned to the defendant. This
being done and nothing having been paid to the
defendant, in the way of a commission, and their dealing
not being completed with, the action was brought by them
against the defendant to collect the amount which they
claimed was due them.

The defendant's account that the defendant
agreed to pay him the amount paid for as a commission
if they presented a business policy to the defendant, and that
they presented a business policy, and the defendant entered into
a written contract with him, they had desired their com-
mission, as the rest of the defendant in entering into
the contract with Bernstein was an assumption by not of
the paper they had presented, and that the defendant making

so accepted Bornstein could not thereafter be heard to say that he was not ready, able and willing to make the purchase. The contention of the defendant, on the other hand, is that the agreement she entered into with the plaintiffs, as evidenced by a clause in the written contract between her and Bornstein, was not as contended by the plaintiffs but was to the effect that she was to pay the plaintiffs a commission of \$1750.00 in case the purchase was completed, and that inasmuch as the purchase was not completed, by reason of the refusal or inability of Bornstein to comply with the terms of the contract, nothing was due the plaintiffs.

Counsel for both parties seem to treat the clause which was inserted in the contract between the defendant and the Bornsteins, covering the question of the commission to be paid, as the contract existing between the defendant and the plaintiffs. But of course that is not the case because the plaintiffs were not parties to that contract. The most that can be said of that provision is that it was some evidence of what the agreement between the defendant and the plaintiffs was, on the question of the commission to be paid in connection with this transaction.

The plaintiffs contend in the first place that the defense sought to be made to the effect that she was only to pay a commission in case the sale was consummated, was not open to her as no such defense was set forth in the affidavit of merits. In our opinion that contention is not tenable. In the fifth paragraph of her affidavit of merits the defendant denied "that she had agreed to pay the

on accepted defendant could not otherwise be bound to pay
that he was not ready, able and willing to make the pay-
ment. The agreement of the defendant, on the other hand,
is that the agreement was entered into with the plaintiff
on evidenced by a receipt in the written contract between
her and defendant, was not as contended by the plaintiff
but was signed after that she was to pay the plaintiff a
sum of \$100.00 in some of the purchase was completed,
and that likewise as the purchase was not completed, by
reason of the refusal of plaintiff to comply
with the terms of the contract, nothing was due the plaintiff.

FACTS.

Defendant has not written to prove the
alleged which was inserted in the contract between the plaintiff
and the defendant, covering the question of the contract
claim to be paid, as the contract relating between the de-
fendant and the plaintiff. But of course that is not the
issue between the plaintiff was not parties to that con-
tract. The next thing to be said of that provision is that
it was not intended to show the agreement between the de-
fendant and the plaintiff was, on the question of the contract
claim to be paid in connection with this transaction.

The plaintiff claimed in the third place that
the defendant was to be bound to the effect that she was
not to pay a sum of money to the plaintiff and was not to
pay any more to her as an oral contract was not valid in
the plaintiff's mind. In any event that contention
is not valid. In the third paragraph of her affidavit
at least she admitted that she had received the

plaintiffs \$1750.00 as commission for the sale of the
aforesaid premises, but states the facts to be that in
the event the plaintiffs should sell the premises or
produce a purchaser who would buy the said premises,
that she would give them a commission for the sale of the
said premises." That allegation, in our opinion, clearly
comprehends a completed transaction and not merely the
execution of a contract to buy and sell. Moreover, no
objection was made in the trial court when evidence was
offered on this issue.

The issue of fact between the parties involved
the question of what their agreement really was, - a
promise by the defendant to pay the commission stipulated,
in case the plaintiffs procured a purchaser, ready and able
and willing to buy, which contingency materialized when the
plaintiffs procured Bornstein and the defendant accepted
him as a purchaser by entering into a written contract
with him; or a promise to pay the commission provided the
purchase was carried out, which contingency did not materialize.
The evidence on that issue was in sharp conflict and in our
opinion this court is not in a position to say that the
verdict of the jury thereon is against the manifest weight
of the evidence. The parties themselves gave testimony
tending to support their respective positions. The con-
tract between the defendant and the Bornsteins could not be
produced as it had either been lost or destroyed, so far as
the evidence shows, and thus such corroboration as would
have been afforded either of the parties, if that contract
had been available, was lost. One Kerins, who acted as the

defendant's lawyer in connection with this transaction, testified that he was present with his client, Mrs. Sias, and the Bornsteins and their lawyer, one Lewis, and the plaintiffs, - all these parties having met in the office of Mr. Lewis with the intention of closing the contract. He testified that at this conference it developed that the Bornsteins were going to put in a second mortgage in part payment of the purchase price, to which he demurred; and that it also developed that the Bornsteins had only \$1,000 to pay the defendant, as earnest money, and that he also objected to that, calling attention to the fact that that was not even enough to cover plaintiffs' commission, and he refused to let his client, the defendant, enter into any such deal, saying that he would not permit her to sign a contract calling for only \$1,000, to be paid as earnest money, when the commission involved was \$1750.00. He further testified that when he took that position, Carlson remarked that he didn't want him to bind his client to such a proposition, and he added; "If this deal don't go through I don't want a dime." Kerins testified that he said if that was the case it would have to be so expressed in writing, and Carlson said he could take his word for it but Kerins remarked he would not take anybody's word in a business deal, adding that if a contract was entered into between his client and the Bornsteins, one of the first considerations would be that the plaintiffs were to receive no commission "unless the deal went through," and further, that the plaintiffs were not to be made parties to that contract and that the earnest money and contract would have to be put in escrow with the Chicago

Title & Trust Company; and the plaintiffs were not to be parties to that escrow agreement; to all of which the plaintiffs agreed, whereupon, a form of real estate contract was produced and the provisions to be inserted in the blanks of that form were dictated to a stenographer; and after this preparation of the contract had been completed, it was executed by Mrs. Sims and the Bornsteins, and then the parties went to the offices of the Chicago Title & Trust Company and placed the contract in escrow there, together with the earnest money payment of \$1,000 made by the Bornsteins. At one point in his testimony Kerins purported to repeat the substance of the words he dictated and which were inserted in this contract, covering the question of the commission to be paid by his client, and the effect of those words was that she was to pay the commission when they produced a buyer, ready, able and willing, to purchase the premises, and that unless they produced a buyer they were to receive no commission. If that was the effect of the words appearing in the contract, it would tend to support the contention of the plaintiffs rather than that of the defendant. We are of the opinion, however, that in view of his unequivocal statement to the effect that he refused to permit Mrs. Sims to enter into any contract with the understanding that she was to pay a commission of \$1750.00, if the plaintiffs produced a purchaser, ready, able and willing, to buy, with only \$1,000 being paid as earnest money, although the entire consideration for the property was \$75,500; and that after some talk back and forth the plaintiffs agreed that the commission was not to be paid unless the transaction was carried out, the

Wittie & Tynd Company; and the plaintiffs were not to be parties to that contract agreement; as all of which the plaintiffs agreed, whereupon, a form of oral contract was first was produced and the provisions to be inserted in the blank of that document related to a memorandum and after this production of the contract had been made, it was executed by Mrs. Sims and the defendant, and then the parties went to the office of the Chicago Wittie & Tynd Company and placed the contract in escrow there, together with the earnest money payment of \$1,000 made by the defendant. At that point in the testimony Evans reported to report the substance of the words as dictated and which were inserted in this contract, covering the question of the commission to be paid by defendant, and the effect of those words was that she was to pay the commission when they produced a paper, ready, sold and delivered, to produce the premium, and that unless they produced a paper they were to receive no commission. It was the effect of the words appearing in the contract, it would tend to prevent the execution of the contract, rather than that of the defendant. As one of the parties, that is to say of his defendant, witness in the trial that he intended to permit Mrs. Sims to enter into the contract with the understanding that she was to pay a commission of \$1,000, if the plaintiff produced a paper, ready, sold and delivered, to pay, with only \$1,000 being paid as earnest money, although the entire consideration for the property was \$1,000, and that after that time and with the plaintiff agreed that the commission was to be paid when the transaction was carried out, the

question was one for the jury to consider and determine. The testimony of Mrs. Sims is to the same effect. While the testimony of the plaintiffs is to the contrary, we are of the opinion that it may not be said that the finding of the jury was against the manifest weight of the evidence. The admitted facts of the terms of the contract between the defendant and the Bornsteins in our opinion tend clearly to support the theory of the defendant. It would seem extremely unlikely that one with any appreciable degree of caution, who was about to enter into a contract to sell a piece of property for \$76,500, would agree to pay a commission of \$1750.00 to the broker, upon his procuring a purchaser, ready able and willing to buy, when he had already procured that purchaser and that purchaser was there ready to sign the contract, and the act of the seller, in entering into that contract, was going to make her liable to pay that commission, and the amount to be paid down was only \$1,000.

Both parties were permitted to introduce secondary evidence as to the provisions inserted in the contract between the defendant and the Bornsteins, reciting the terms of the agreement by the defendant as to the payment of the commission. Evidence of what this provision was, was competent as being some evidence of the agreement as to commissions between the plaintiffs and the defendant, although it did not constitute their agreement, which was oral, as heretofore pointed out. Counsel for the plaintiffs points out that while he was in a position to introduce such secondary evidence merely upon the failure of the defendant to produce a copy of the contract,

question was one for the jury to consider and determine.
The testimony of Mrs. Sims is to the same effect. While
the testimony of the six witnesses is to the contrary, and the
of the opinion that it may not be said that the finding
of the jury was against the weight of the evidence.
The admitted facts of the terms of the contract between
the defendant and the horse owner in my opinion seem clearly
to support the theory of the defendant. It would seem
extremely unlikely that one with any appreciable degree
of caution, who was about to enter into a contract to
sell a horse of property for \$75,000, would agree to pay a
commission of \$150.00 to the broker, upon his procuring
a contract, which was not to be paid until the horse was
actually procured. That contract was not made until the
horse was ready to ship the contract, and the act of the seller
in entering into that contract, was going to make her liable
to pay that commission, but the amount to be paid was not
paid at that time.

That section was admitted to introduce secondary
evidence as to the provisions inserted in the contract between
the defendant and the horse owner, reciting the terms of the
agreement by the defendant as to the payment of the commission.
Evidence of what this provision was, was necessary as being
secondary evidence of the agreement as to commission between the
defendant and the witness, although it did not constitute
their agreement, which was oral, as horse owners pointed out.
I cannot but be satisfied that the witness's statement was not
a decision to introduce such secondary evidence merely upon
the failure of the defendant to produce a copy of the contract.

pursuant to notice, the plaintiffs never having had a copy of the contract themselves, the defendant could not introduce secondary evidence without satisfactorily accounting for the absence of the contract, it having been shown to have been in her possession at one time; and further, that the court erred in considering the showing made, a satisfactory one. In our opinion it may not be said that the trial court erred in that regard. It appears from the uncontradicted evidence in the record that when this contract between the defendant and the Bornsteins was prepared, it was in triplicate. It does not appear, whether one, two or three copies were deposited with the Chicago Title & Trust Company in escrow, and if only one or two, what disposition was made of the other copy or copies. In our opinion, the trial court erred in one ruling on the evidence relating to this question. Counsel for the plaintiffs called Kerins to the witness stand and asked him what became of the contract after it was executed. Objection was interposed to that question by counsel for the defendant, on the ground of privilege, and that objection was erroneously sustained. The question of privilege was not involved and the witness should have been permitted to answer the question. We are of the opinion, however, that this error was not such as to call for a reversal of the judgment. The evidence in the record shows clearly that no copy of this contract was in the possession of anyone who had anything to do with the transaction nor did any of such parties have any knowledge of what had become of the contract or where it was. It is true, as counsel for the plaintiffs points out, the defendant's

... it is not the plaintiff's name having had a copy
of the contract themselves, and defendant could not have
done so without necessarily assuming
for the purpose of the contract, it having been shown to
have been in his possession at one time and another, that
the court erred in considering the showing made, a mere
fact only. In my opinion it may not be said that the
trial court erred in that regard. It appears from the un-
contradicted evidence in the record that when this contract
between the defendant and the plaintiff was executed, it
was in triplicate, it does not appear, whether one, two
or three copies were deposited with the Illinois State
Trust Company in Chicago, and if only one or two, what dis-
position was made of the other copy or copies. In my
opinion, the trial court erred in not ruling on the evidence
relating to this question. Counsel for the plaintiff
called Latta to the witness stand and asked him what became
of the contract after it was executed. Objection was inter-
posed to that question by counsel for the defendant, on the
ground of privilege, and that objection was unanimously
sustained. The question of privilege was not involved and the
witness should have been permitted to answer the question.
To me at the moment, however, that will not do and
as to the relevance of the question. The evidence in
the record shows clearly that all part of this contract was in
the possession of the plaintiff and that it was in his
possession at all times when he was in possession of it.
It is not necessary to say more of this contract or what it was. It is
clear, as shown from the plaintiff's point of view, the defendant's

husband was not produced as a witness and it would seem from a receipt appearing on the original escrow agreement, which was introduced in evidence, that, when the escrow was terminated, the contract deposited in connection with the escrow was delivered either to Mr. Sims or to Mr. Lewis, counsel for the Bornsteins. Lewis was called as a witness and said that he had made a search for a copy of the contract, but no copy was in his possession, and his best recollection was that it had been turned over to Kerins. Both the latter and his client testified that they had made searches for the contract and that it was not in their possession and so far as they could recollect never had been and they did not know where it was. So far as Mr. Sims is concerned, the defendant, his wife, was permitted to testify, without objection, that in connection with her search she asked him "if he knew anything about it; he said no, he hasn't got it."

While Kerins was being interrogated as to what efforts he had made to locate the copy of the contract; after stating what he had done, in detail, he added: "I have made every possible search and inquiry to locate these contracts, because if I had them they would have no case right here now." It is urged that this so prejudiced the plaintiffs' case as to necessitate the reversal of the judgment. The same contention is made with reference to another remark made by this witness in the course of his testimony, when he was asked what provision was inserted in the contract between the defendant and the Bornsteins concerning the amount of the commission to be paid and particularly what amount was specified in that provision, and he

...and it would seem
from a reading appearing on the original answer agreement
which was introduced in evidence, that, when the answer
was furnished, the contents deposited in connection with
the answer was delivered either to Mr. Sims or to Mr. Lewis,
common for the Government. Lewis was called as a witness
and said that he had made a search for a copy of the answer,
but no copy was in his possession, and he had no recollection
any that it had been turned over to Lewis. On the other hand
and his client testified that they had each searched for the
answer and that it was not in their possession and so far as
they could remember never had been and they did not know
where it was. On the other hand, it was shown, the answer
and, his wife, was permitted to testify, without objection,
that in connection with her search she asked him if he knew
anything about it; he said no, he didn't know it.

While Lewis was being interviewed as to what
attests he had made to furnish the copy of the answer;
after which, when he had been, in detail, in detail, the
case was then brought to the attention of the jury and
testimony, because it stated that they could have no more
evidence. It is noted that this is prejudicial and
inadvisable, and as the Government is concerned by the
Government, the same Government is not able to present to
another party with the same rights as the Government of the
Government, and in the case of the Government and the Government
in the present case, the Government and the Government
concerning the matter of the Government as to the Government
which was then was presented in that position, and in

answered, "\$1750.00 provided the deal went through," and it was objected that that was not responsive to the question, and the witness then added: "it would be unfair, Your Honor," meaning that it would be unfair to require him to merely state the amount without including the further provision to the effect that this amount was to be paid only in case the deal went through. In our opinion, the contention made, as to these two matters, is not tenable. The remark last referred to was not at all serious and as to the remark first referred to, the objection which counsel interposed was immediately sustained and the court ordered it stricken from the record, and, at the request of counsel for the plaintiffs, directed the jury to disregard the statement. We do not consider that the prejudicial effect this remark may have had was such that it could not be cured and eliminated by the action which the court took.

The plaintiffs complain of the fact that both the defendant and Kerins in the course of their testimony repeated a number of times the assertion that the memorandum of the agreement of the defendant, as to commissions, which was inserted in her contract with the Bornsteins, was to the effect that she was to pay a commission only in case the sale was consummated. We believe the plaintiffs are in no position to complain of that matter. A number of these repetitions so complained of by the plaintiffs were brought on by their counsel in cross-examining the witnesses, and furthermore, no objection was interposed when these statements were repeated in the course of the direct examination,

answered, "I'll be damned if I don't go through," and is
was objected that that was not responsive to the question,
and the witness then asked: "It would be better, Your
Honor," meaning that it would be better to require him to
swear the amount without including the further pro-
vision to the effect that this amount was to be paid only
in case the deal went through. In our opinion, the ques-
tion was, as to these two matters, is not material. The
witness last referred to was not at all serious and as to the
second first referred to, the object in which counsel inter-
posed was immediately sustained and the court entered its
order from the record, and, at the request of counsel the
provision directed the jury to disregard the state-
ment. It is not necessary that the jury should effect this
remedy any more than was said that it could not be cured and
eliminated by the action which the court took.

The following exhibits of the facts were put in
evidence and taken in the course of the trial, and were
a number of times the question that the genuineness of the
signature of the document, as to commission, which was
inserted in her contract with the defendant, was to the
effect that she did not pay a commission only in case the
deal was successful. It will be seen that the witness
was in receipt of that matter. A number of other
testimony as compared with the exhibits were brought
out by their counsel in cross-examining the witness, and
therefore, as evidence was introduced when these exhibits
were first put in the matter of the first testimony.

with the exception of one occasion, and when that objection was interposed it was sustained.

The plaintiffs contend further that there is no competent proof in the record, showing that the failure to consummate this sale was the fault of the Bornsteins rather than the defendant, and that the fact is that the defendant withdrew from the contract and voluntarily released the Bornsteins, and that she may not successfully avoid paying a commission in that manner. In our opinion, the record does not bear out that contention. The defendant testified to the fact that the Bornsteins "refused" to carry out their purchase of the property. But thereafter, the defendant proceeded to testify to the conversation she had with Bornstein in which he stated that he and his wife did not have the money and were tied up in some other transaction so that they could not go through with the purchase of the defendant's property. The plaintiffs contend that this evidence was incompetent, on the ground that it was within the hearsay rule. This evidence, in our opinion, was admissible. The statement of Bornstein to the defendant, to the effect that he was not able to carry out the purchase of the defendant's property was a verbal act, - his very statement constituted a withdrawal from the contract, - and it also gave his reason for that act. Such statements are admissible. Wigmore on Evidence, Vol. III, sections 1729 and 1772; 1 Greenleaf on Evidence (13th Ed.) sec. 98, 99. Kerins gave similar testimony as to a conversa-

tion he had with the lawyer of the Bornsteins, stating that Mr. Lewis told him that he had discussed the matter with his client, Bornstein, and said "I don't think they have got any money;" that Bornstein had told him his wife was sick and didn't have any money and that he figured if "he (Bornstein) turned the contract to somebody else, why she (the defendant) probably could get out of it." It appears that after giving this testimony, Kerins proceeded to say that he called up Mr. Carlson, one of the plaintiffs, and gave him the information he had obtained from Lewis, and that Carlson then said he would get another buyer.

The plaintiffs complain of the action of the trial court in refusing two written instructions which were submitted. In our opinion the action of the trial court, this being a case tried in the Municipal Court of Chicago, in refusing the two tendered written instructions and electing to instruct the jury orally, was not error.

Merton v. Eusey, 237 Ill. 26. The record fails to show that any objection was interposed by counsel for the plaintiffs to the oral charge as given the jury by the trial court. To be in a position to urge that error was committed in connection with the charge to the jury, objection must have been made in the trial court, and such objection must have pointed out specifically the portion of the charge objected to whether the complaint involves a matter of commission or omission. Briggs & Turivas v. Joseph & Brothers Co., 175 Ill. App. 438.

For the foregoing reasons the judgment of the

also he had with the lawyer of the defendant, stating
that Mr. Lewis told him that he had answered the question
of the defendant, and said "I don't think
they have got any money", that defendant had told him
his wife was rich and didn't have any money and that
he thought if he (defendant) turned the contract to
somebody else, why the (defendant) probably could
get out of it. It appears that after giving this testi-
mony, Lewis proceeded to say that he called up Mr. Lewis,
one of the plaintiffs, and gave him the information
he had obtained from Lewis, and that Lewis then said
he would get another lawyer.

The plaintiff's complaint of the action of the trial
court in refusing two written instructions which were sub-
mitted. In his opinion the action of the trial court,
this being a case tried in the Federal Court of Chicago,
in refusing the two proffered written instructions and
directing to instruct the jury orally, was not error.
Morton v. White, 217 Ill. 52. The record fails to show
that any objection was interposed by counsel for the plain-
tiffs to the oral charge as given the jury by the trial
court. To be in a position to urge that error was com-
mitted in connection with the charge to the jury, objec-
tion must have been made in the trial court, and such ob-
jection must have pointed out specifically the portion of
the charge objected to whether the complaint involves a
failure to instruct or refusal to submit a written in-
struction.

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Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

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HARRIET ELIZABETH GIESEN,

Appellee,

v.

JOSEPH NICODERUS GIESEN,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 606

Opinion filed March 10, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The parties to this case were married in 1894. They have one child, a son, over 21 years of age. It appears from the testimony in the record that they have separated on a number of occasions, the last separation taking place on July 26, 1921. In August 1923, the complainant, Mrs. Giesen, filed a bill for divorce against her husband, alleging desertion, upon the occasion of the separation in July, 1921. The defendant husband filed his answer denying the material allegations of his wife's bill, and later, he filed a cross-bill charging his wife with deserting him at the time of the last separation, and praying the court to grant him a divorce on that ground. Mrs. Giesen filed her answer to the cross-bill, denying its allegations. The issues thus joined were submitted to the chancellor, and after hearing the testimony submitted by the respective parties, a decree was entered in favor of the complainant, granting her a divorce from the defendant on the ground of desertion and awarding her alimony in the sum of \$7.00 per

241 I.A. 606

Opinion filed March 10, 1932.

MR. JUSTICE THOMAS delivered the opinion of the court.

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week. The defendant has perfected his appeal from that decree, contending that the chancellor erred in entering a decree in favor of the complainant, and also in failing to grant him a divorce as prayed for in his cross-bill. No reference was made to the cross-bill in the decree appealed from.

The complainant testified that she and her husband were married January 21, 1894, and lived together as husband and wife until July, 1921, when her husband left their home and did not return to her; that he had left her previously about eight times and that during the last period in which they lived together "he was home really on probation;" that he only provided for the home in part; that when he returned home the last time she asked him to let her handle the money because of his wastefulness, and thereafter she did handle both his earnings and what she received from the rent of some of their rooms, her explanation being that "in case of another separation this money was to be divided." She testified that one day some time later, her husband became angered over money matters and demanded his share of their savings. Apparently, she gave him a check for his half of the money on hand, and the following day, the complainant testified she prepared the meals and then asked her husband if he had cashed the check. Whether or not he had done so does not appear from the evidence. Continuing, the complainant testified that after that she did not prepare the meals, "and I think I had to remind him that the room he was occupying brought in four dollars rent, and after that he left the four dollars

that. The defendant has requested his return from that country, contending that the complainant acted in entering a divorce in favor of the complainant, and also in failing to grant him a divorce as requested in his answer-111. He has asked that the return be made to the court in the terms suggested from.

The complainant testified that she and her husband were married January 21, 1894, and lived together as husband and wife until July, 1901, when her husband left their home and did not return to her; that he had left her provisionally about eight times and that during the last period in which they lived together "he was home mainly on Sundays; that he only visited for the hours in part; that when he returned from the last time she asked him to let her handle the money because of his wandering, and thereafter she did handle both his earnings and what she received from the rest of some of their friends, her explanation being that in case of another separation this money was to be divided." She testified that one day some time later, her husband became engaged over many months and demanded his share of half earnings, and finally, she gave him a check for all half of the money he had, and the following day, the defendant testified that she had given him the money and that she had been so long and spent from the witness. Examining, the complainant testified that after that she did not receive the money, and that she had not received it from the defendant. She testified that she had not received it from the defendant, and that she had not received it from the defendant.

on the dresser and he began to plan to leave and about four weeks later he left me." She also testified that she always tried to influence her husband "to do what was best for him," and that she learned he was planning to go up to Minnesota, where his mother was still living "on the farm," and that later he bought a trunk and left. This was the separation which is the basis of both the bill and cross-bill, and which occurred in July, 1921. Complainant testified that in the latter part of that year her husband came back one day and they had a little visit; that she learned he had been back in the city since the previous Saturday and that he did not call her up until Monday, and she felt slighted about that and "was rather cool;" that he visited a little while and asked her why the rooms were vacant at the time and she replied that if it was not for her efforts she wouldn't have a home, - "and what difference does it make to him, and that made him angry and he went away." The court asked her if her husband asked to come back and she said he did not.

Considerable evidence was presented on the question of the defendant's financial status and ability to pay alimony, to which, in the view we take of the case, it will not be necessary to refer. It appears from this evidence that in 1916, the parties had entered into a written agreement, at a time when they were living separate and apart, the substance of which was to the effect that in consideration of the release by Mrs. Giesen of any and all claim for support, maintenance or

on the morning and he began to plan to leave and about
four weeks later he left me. The day following that
the day after he left me, the day after he left me
and that day after he left me, the day after he left me
to go up to Minnesota, where his mother was still living
"on the farm", and that later he bought a truck and left.
This was the separation which in the hands of both the
Bill and Brown-Bliss, and which occurred in July, 1935.
The witness testified that in the latter part of that
year his business came back one day and they had a little
talk, that the witness had been back in the city
about September or October and that he did not call
but he called anyway, and was told about about that
and "was rather small", that he visited a little while and
about that time he came to the fact that he was not
married and that he was not married and was not
married and that was the difference between it and to him.
and that was the way and he was small. The witness
testified that he was not married to him and she
was not married.

The witness was presented on the
witness in the defendant's (around 1935 and 1936)
in the witness, it is said, in the fact of the case,
it is said in the witness, it is said in the witness,
witness and in 1935 the witness had visited him
witness (witness) is a fact that they were living
witness and that the witness of which was to the
witness that is some evidence of the witness by the
witness of the witness in the witness.

interest of any kind, which her husband might have in the estate of his father, (excepting any right of dower which might vest in her upon her husband's death), he agreed to pay her one-third of such salary as he might receive from time to time, such weekly allowance to be not less than \$15.00 per week "unless the same shall prove a hardship and impossible of performance," in which case the amount to be paid was to be determined by arbitrators; and defendant also agreed to assign to complainant one-third of his interest in his father's estate and further to dispose of his interest in certain life insurance policies as therein provided. The complainant admits that she has received approximately \$3,800 from the defendant under this contract. On cross-examination she was asked whether she and her husband had not discussed a separation before and she answered that they had done so a number of times and that she had twice previously brought an action for divorce against him. In the course of her testimony the complainant referred to another woman, but no competent evidence was submitted, showing or tending to show, any improper relations by the defendant with such a woman, nor was any complaint of that nature included by the complainant in her bill. Referring to the contract of 1916, the complainant stated it was an agreement to protect her in case of a separation. On cross-examination she was asked whether or not, at about the time of this separation in July, 1921, she didn't say, in the course of a conversation with her son, that she was going to "throw him out," referring to her husband, and she answered that she had no recollection of any such conversation at any time. Counsel pressed her

interest of my kind, which her husband might have in the
 estate of his father, (conveying my rights of house which
 might pass in her upon her husband's death), he agreed to
 pay her one-third of each salary as he might receive from
 time to time, such weekly allowance to be not less than
 \$15.00 per week "until such time shall prove a hardship
 and impossible to be borne," in which case the amount
 is to be determined by arbitrators; and defendant
 has also agreed to assign to complainant one-third of his
 interest in his father's estate and further to assign of
 his interest in certain life insurance policies as therein
 provided. The complainant admits that she has received
 approximately \$15.00 from the defendant under this con-
 tract. On cross-examination she was asked whether she and
 her husband had not discussed a separation before and she
 answered that they had done so a number of times and that
 she had twice previously brought an action for divorce
 against him. In the course of her testimony the complainant
 was referred to another woman, but no competent evidence
 was exhibited, showing or tending to show, any improper
 relations by the defendant with said woman, and the
 complaint of that nature introduced by the complainant in her
 bill. Referring to the contract of 1914, the complainant
 stated it was an agreement to proceed but in case of a
 separation, on cross-examination she was asked whether
 or not, at that time and of the separation in July, 1914,
 and didn't say, in the course of a conversation with her
 husband, that she wanted to "leave the house," following to her
 my own investigation of my kind, against himself and

for an unequivocal answer, as to whether or not she had said such a thing, and the most she would say was that she had no recollection of it. She was asked whether she cared to say that she did not say it, and she answered, "I would not think I would say it, because I have been always too lenient. Judging from my feeling about it, yes, I would say yes, that I did not say so." She admitted that when her husband left in July, 1931, she did not ask him to stay. She was asked whether she was quite willing to have him go and she answered: "I was very anxious to have him remain home, if he would remain in the right spirit, always,- always glad to have him home in the right spirit, and would be today, for that matter." She said she did not ask him to stay that particular day, "but always I had asked him to."

The complainant submitted the testimony of three witnesses in addition to her own. A Miss Sheldon testified that she had known the complainant for about three years but that she did not know the defendant, and that during the time she had known the complainant her husband had not been living with her. A Miss Laurin testified that she had known the complainant since June 1932 (about a year after the separation took place) but that she had never known the defendant. Apparently, this witness was a roomer in the complainant's home for about 13 months from June 1932 on, and she testified that during that time no one was living with the complainant as her husband. The last of the three witnesses, a Miss Sharpe testified that she had known the complainant since 1919, and also that she knew the defendant. She was asked how long she had known

him and she answered that "it was after that." She testified that the complainant and the defendant had not been living together as husband and wife since July 1931.

The foregoing was all the testimony submitted by the complainant in support of her bill. To entitle one to a decree of divorce on the ground of desertion, a complainant must establish, by proper testimony, not only that the defendant left the complainant more than two years prior to the date of the filing of the bill of complaint and that the parties have not lived together since that time, but also, that the defendant left "without reasonable cause." It will be seen from an examination of the evidence submitted by the complainant in support of her case that she was not corroborated on any one of the points above referred to, except, possibly, the second one. However, the defendant is shown in the record to have admitted that he left his wife in July, 1931, and that they have not lived together since but he does not admit that he left without reasonable cause. On the contrary, he specifically denied that in his answer and in his cross-bill alleged facts tending to show that he did have reasonable cause for leaving his wife and that the circumstances were such as to amount to a desertion of him on her part. In our opinion, it is entirely clear that the complainant was not entitled to a decree for divorce from the defendant on the ground of his desertion of her, from the testimony in this record. Not only is there no corroboration whatever of her contention that the defendant left her without reasonable cause, but, in our opinion, her own testi-

him and the answer was "it was not that". The doctor
said that the complaint was the defendant had not been
living together as husband and wife since July 1931.

The existing was all the testimony submitted
by the complainant in support of her bill. To enable me
to a degree of divorce on the ground of desertion, a com-
plaint, was established, by proper testimony, not only that
the defendant left the complainant more than two years
before he was at the date of the bill, but also that
he had left her and that he had been living with
another woman, and that he had been living with her
since. It was also found on examination of the
house submitted by the complainant in support of her
bill that she was not cohabiting on any one of the
dates above referred to, namely, the second
of January, the defendant in which in the record is
that she stated that he left her in July, 1931, and
that they have not lived together since but he does not
state that he left her without reasonable cause. On the basis
of this, it was finally found that in his answer and in
his counterclaim, alleged facts tending to show that he did
not voluntarily leave her leaving her wife and that she
deserted him, were such as to amount to a desertion of him
on her part. It was found that he was not living with
another woman and that he was living with her. The
complaint was found to be true on the ground of his desertion of her, and the
complaint was found to be true on the ground of her desertion of him.
The defendant was found to be guilty of desertion of his wife and she was
found to be guilty of desertion of her husband.

mony does not make out a prima facie case to that effect. We are not interested in the prior separations of these parties, which are referred to in the record. According to the complainant's own testimony, whatever was involved in those separations had been condoned. It is not contended that anything happened in connection with the separation of July, 1921, that would have the effect of reviving anything that had happened in the past, nor is there any evidence that would tend to show that such was the case. Apparently, the real difficulty between these parties rested upon the question of money matters. If, as the complainant herself testified, she cared so little for his presence in the home that she neglected to prepare the meals, and felt that she "had to remind him that the room he was occupying brought in four dollars rent," it is not surprising that he sought other quarters.

When the defendant took the stand he was asked to tell the court how he and his wife came to separate in July 1921, and the substance of his answer was to the effect that he had lost his position; that he had had a nervous break down and his wife "commenced to get kind of cool towards me;" that he wanted to take a front room in the house and that she remarked that there wasn't room enough in the house for both of them. Apparently, he did not leave at that time but about two weeks later, he testified he met his wife one day on the street and she said, referring to the room he was occupying, "Joe, I want to use that room, when are you going to get out of the house;" and that he replied, in substance, that if

that was how she felt about it he would get his trunk and leave. He stated further that when he returned home on that occasion his wife had separated his things, all ready for him to pack up. The defendant testified further that the last time he was living at home he was there only about three months and that he came home at the beginning of that period because he asked his wife to take him back. For reasons already referred to we will not comment on the testimony given by him on the question of his ability to pay alimony.

The only other witness who testified was a Mrs. Loveland, submitted by the defendant. It appears that she lived in the complainant's home as a roomer for about five months, from February to July, 1931. She testified that she was present at the time the defendant left and that at that time she heard the complainant say to her husband "that he could go, that is all, get a trunk and move." She testified further that on one occasion she heard the complainant talking to her son over the telephone and that she told her son that "she was going to put him out," referring to her husband.

After the defendant and Mrs. Loveland had testified both parties rested and a discussion followed between counsel and remarks were made by the court, all referring to the question of alimony. The complainant was then recalled to the stand and gave some further testimony, all of which had to do with the question of the ability of the defendant to pay alimony. She made no reference in her testimony to any of the matters which had been testified to, either by her

that woman and told about it to would say his trunk
and leave. He stayed there until when he returned home
on that occasion his wife had suggested his things. All
though she did not go. The defendant testified further
that the last time he was living at home he was there only
about three months and that he came home at the beginning
of that period because he asked his wife to come home
back. Her reasons already referred to as will not concern
as the testimony given by him on the question of his
ability to pay alimony.

The only other witness who testified was a Mrs.
Leland, summoned by the defendant. It appears that she
lived in the complainant's home as a housekeeper for about five
months, from February to July, 1931. She testified that
she was present at the time the defendant left and that so
that time she heard the complainant say to her husband "that
he would go, that is all, just a trunk and move." She
testified further that on one occasion she heard the com-
plainant talking to her son over the telephone and that
he told her son that "she was going to get him out."
reluctant to pay alimony.

After the defendant and Mrs. Leland had testi-
fied both parties rested and a discussion followed between
counsel and remarks were made by the court. All testimony
the matter of alimony. The complainant was then recalled
to the stand and gave some further testimony, all of which
led to an examination of the ability of the defendant
to pay alimony. She made no reference in her testimony to
any of the matters which had been testified to, either by her

husband or Mrs. Loveland. In addition to the testimony already referred to, submitted by the defendant, he was asked whether he had paid his wife any money toward her support since the separation in July 1931, and he said he had. He was asked how much he had given and he answered: "I always gave her \$20 to \$30 when I was working, stayed home, I gave her \$35 and \$40. Then I could get \$45 sometimes."

Considering all the evidence in this record, we are of the opinion that it establishes the right of the defendant and cross-complainant to a decree of divorce from his wife on the ground of desertion, as prayed by him in his cross-bill. So far as the testimony in this record goes it would seem that the defendant was nothing more than a roomer in his own home. If these parties had differences over money matters, as would appear from the evidence submitted by both of them, and in July 1931, complainant told her husband he could pack up his things and leave, and if she told her son she was going to put him out, none of which she denies, but all of which, if anything, is corroborated by her own testimony, we are of the opinion that, in legal effect, the complainant deserted her husband in July 1931 and that the proof to this effect is sufficient to meet the requirements of the statute. We, of course, may not indulge in any conjectures as to whether either of these parties might have submitted further proof, had they chosen to do so, but we are obliged to take such action as in our opinion is proper under the law, on the proof they did submit as disclosed by the record.

...in addition to the testimony already given, submitted by the defendant, he was asked whether he had paid any money toward the support since the separation in July 1931, and he said he had. He was asked how much he had given and he answered: "I always gave her \$100 in 1931 when I was working. I gave her \$200 and \$400. When I could not pay more."

...the evidence in this matter. ...the defendant and other witnesses to a house at ...the ground of desertion, as ...in his own home. It ...had different over money matters, as ...the evidence submitted by each of them ...and in July 1931, defendant said her husband had paid ...and it was said that he had paid her ...we must not lose sight of the fact that ...all of which is admitted by defendant ...testimony, as one of the reasons that in 1931 ...defendant deserted her was in July 1931 and that she ...went to this extent in order to meet the necessities of the family. Of course, we are not taking it any ...anywhere as to whether either of these parties at any ...and they began to do so ...but as the witness in this case stated it is not ...he never again saw her or her mother and his wife in ...children of the family.

For the reasons we have referred to, the decree of the Circuit Court is reversed and the cause is remanded to that court with directions to dismiss the bill of complaint, for want of equity, and enter a decree in favor of the cross-complainant, as prayed in his cross-bill.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

TAYLOR AND O'CONNOR, JJ. CONCUR.

The first of these is the fact that the
 majority of the population of the country is
 still in a state of ignorance and
 superstition, and that the people are
 generally poor and illiterate.

The second is the fact that the country is
 generally poor and illiterate.

THE SECOND OF THESE IS THE FACT THAT THE COUNTRY IS

5 - 29322

ROBERT W. McILVAINE,

Plaintiff in Error,

v.

AUGUST A. MEYER, JOHN P. AUSTIN,
ALLAN J. COLEMAN, JUSTIN K. ORVIS,
LOUIS VERNON, JAMES A. BILLINGS
and EUGENE A. LYON,

Defendants in Error.)

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

241 I.A. 606

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action of assumpsit against
the defendants to recover the amount he had paid to them
for certain securities, which he claimed were designated
class "D" securities under the provisions of the Illinois
Securities law, for the reason that the defendants failed to
file certain documents in the office of the Secretary of State,
as required by the provisions of that act. Substantially
all of the evidence offered by plaintiff was, upon objec-
tion, excluded and at the close of plaintiff's case there
was a directed verdict in favor of the defendants.

The facts and the law involved in this case, except
as to the several amounts plaintiff gave the defendants are
the same as in the case of Wood v. Meyer, et al., Sen. 29321,
Illinois Appellate Court, First District, in which we have
filed an opinion this day.

1-10-1936

RECEIVED

DEPARTMENT OF JUSTICE

TO

ATTORNEY GENERAL

FROM

241 A. 608

RECEIVED
DEPARTMENT OF JUSTICE
MARCH 10 1936

Documents in Case.

Opinion filed March 10, 1936.

Mr. Justice Brandeis delivered the opinion of

the Court.

Plaintiff brought an action at common law against

the defendant to recover the amount he had paid to them

for certain securities, which he claimed were defective

and to recover the amount of the interest on the same.

The defendant denied the plaintiff's claim and

pleaded in answer to the complaint that the securities of which

he claimed to be the owner were not securities of the

defendant but were securities of another corporation.

The defendant also pleaded that the securities of which

he claimed to be the owner were not securities of the

defendant but were securities of another corporation.

The defendant also pleaded that the securities of which

he claimed to be the owner were not securities of the

defendant but were securities of another corporation.

There is no dispute that the

The defendants in this case have filed briefs and arguments identically the same as those filed by them in the Good case, except as to the title of the case. In these circumstances, what we have said in the Good case is applicable here and for the reasons there given, the judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THORSON, F.J. AND TAYLOR, J. CONCUR.

The statement in this case has been filed with
 the court and is identical to the one as filed by him in
 the first case, except as to the title of the case. In
 the first case, the title was "The People vs. John Doe",
 and in the second case, the title is "The People vs. John
 Doe, et al." The statement in the second case is identical
 to the one in the first case, except as to the title of the
 case.

Respectfully,
 Your obedient servant,
 J. Edgar Hoover

Very truly yours,
 J. Edgar Hoover

81 - 30334

CLARA LOUISE UEBELE,

Appellee,

v.

GEORGE D. UEBELE, JR.,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 T.A. 606

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal the defendant seeks to reverse a decree awarding complainant separate maintenance in accordance with the prayer of complainant's bill and dismissing the defendant's crossbill for a divorce for want of equity.

On July 31, 1923, the complainant filed her bill against defendant praying that a decree be entered awarding her separate maintenance, alleging inter alia that on December 8, 1921, the defendant willfully deserted her without any reasonable cause. He answered the bill and on October 8, 1923, filed a crossbill for a divorce, based on the ground that on December 10, 1921, complainant had deserted him without cause. She answered the crossbill and on February 11, 1925, by leave of court, filed an amended bill. The defendant answered the amended bill; the matter was heard before the chancellor and a decree entered March 9, 1925, awarding complainant the relief she prayed for and dismissing defendant's crossbill for want of equity.

The evidence tends to show that complainant and defendant were married November 11, 1909, and continued to

EX - 10000

CLARK HOUSE, NEWARK, N.J.

Applicant,

VERSUS

CIRCUIT COURT,

241 F.A. 608

Opinion filed March 10, 1936.

MR. JUSTICE GIBSON delivered the opinion of

the court.

By this appeal the defendant seeks to reverse a decree annulling complaint against maintenance in accordance with the proper of complaint's bill and demanding the defendant's execution for a divorce for want of equity.

On July 31, 1935, the complaint filed her bill against defendant praying that a decree be entered annulling her separate maintenance, alleging inter alia that on December 6, 1931, the defendant willfully deserted her without any reasonable cause. He answered the bill and on October 9, 1934, filed a crossbill for a divorce, based on the ground that on December 10, 1931, complaint had deserted him without cause. He answered the crossbill and on February 11, 1935, he filed an amended bill. The defendant answered the amended bill; the matter was heard before the court and a decree entered with it. The resulting complaint the relief he prayed for and dissolution of the marriage for want of equity.

The plaintiff seeks to annul this complaint and the decree entered November 11, 1935, and maintain in

live together until about December 8, 1921; that there were no children born of the marriage; that about April, 1919, Mr. and Mrs. Krause, who had been friends of the defendant since they were children, came to live with the complainant and defendant. A few months thereafter the defendant and Krause rented another apartment and the two families moved into it and lived together. Sometime prior to July, 1919, trouble arose between Krause and his wife and he left. His wife continued to live in the apartment with complainant and defendant. About July 10, 1919, Krause returned with an attorney in an endeavor to induce his wife to leave the apartment and live with him at another place. She refused to do this and thereupon Krause accused the defendant of having improper relations with his wife. This was denied by the defendant and a quarrel followed. Krause left the premises but his wife refused to go with him, and thereafter complainant, defendant and Mrs. Krause continued to live in the apartment until the following spring when the lease expired, and thereupon the three moved to another apartment, although complainant objected to Mrs. Krause going with them to the new apartment. The evidence further shows that prior to July, 1919, complainant and defendant lived together without having had any misunderstanding and that they up to that time had no trouble with Mrs. Krause. The evidence shows that the defendant, together with his cousin, conducted a store in South Chicago and that his wife assisted him in the conduct of the store for a while, but apparently, the work became too hard for her and the defendant then em-

live together until about November 2, 1912; that there were
no children born of the marriage; that about April, 1913,
Mr. and Mrs. Lums, who had been friends of the defendant
since they were children, came to live with the complain-
ant and defendant. A few months thereafter the defendant
and Lums wanted another apartment and the two families
moved into it and lived together, beginning prior to July,
1913, trouble arose between Lums and his wife and he left.
His wife continued to live in the apartment with complain-
ant and defendant. About July 10, 1913, Lums returned
with an attorney in an endeavor to induce his wife to
leave the apartment and live with him at another place.
The witness is so sure and therefore Lums accused the
witness of having improper relations with his wife.
This was denied by the witness and a verdict followed.
Lums left the apartment and his wife refused to go with
him, and thereafter complainant, defendant and the witness
continued to live in the apartment until the following
spring when the lease expired, and between the three
moved to another apartment. Although complainant refused
to live with Lums and his wife in the new apartment, the
witness further knows that prior to July, 1913, complain-
ant and defendant lived together without having had any
misconducting and that they up to that time had no
relations with Lums. The witness shows that the
defendant, together with his cousin, conducted a store
in South Chicago and that his wife assisted him in the
conduct of the store and was a clerk, but was not
more than the wife and the witness had no

ployed Mrs. Krause in her stead. Mrs. Krause was employed down town during the day and worked at the defendant's store during the evening. The store closed about nine o'clock and the defendant and Mrs. Krause would come home together at about 9:30 o'clock when the complainant usually had the evening meal ready for them. The evidence further shows that in August, 1921, complainant, defendant and Mrs. Krause went on a trip to Yellowstone Park together. Complainant testified that she objected to Mrs. Krause going with them on that trip. On one occasion the three occupied the same room in a hotel; defendant taking the position that this was necessary to save expense. Complainant testified that in the morning she stepped out of the room to go to the lavatory and when she returned, she found the door to the room locked; that she rapped on the door and after a few minutes the door was opened. Complainant further testified that on Labor Day, 1921, after the three had returned from a drive in the evening, she found the defendant in Mrs. Krause's bedroom embracing her and that complainant objected. The evidence shows that on December 8, 1921, there was trouble between complainant and defendant. Complainant testified that he struck her on the side of the face, wrenched her arms and left black and blue finger prints on her wrist; that on the 10th of December, 1921, the complainant in the meantime having conferred with a lawyer, to see what could be done to put Mrs. Krause out of the apartment, left the apartment and remained away until about the 21st of that month. The defendant testified that as

played Mrs. Evans in her room. Mrs. Evans was employed
down town during the day and worked at the restaurant
store during the evening. The store closed about nine
o'clock and the restaurant and Mrs. Evans would come
home together at about 9:30 o'clock when the complaint
and usually had the evening meal ready for them. The
evidence further shows that in August, 1961, complaints
detached and Mrs. Evans went on a tour for the restaurant
and the complaint testified that she objected
to Mrs. Evans going with them on that trip. On one
occasion the three occupied the same room in a hotel;
testimony taking the position that this was necessary
to save expense. Complaint testified that in the
morning the stopped out of the room to go to the laundry
and Mrs. Evans testified she found the door to the room
locked. That she opened on the door and after a few
minutes the door was opened. Complaint further testified
that on about May, 1961, after the three had returned from
a trip to the country, the door to the room in the
morning, without knocking, but Mrs. Evans testified that
the three were that on November 9, 1961, there was
evidence further testimony and testimony. Complaint
testified that he found her in the room at the time
returned her room and left Evans and that Evans testified
on her return that on the first of November, 1961, the
complaint in the restaurant being advised that a report
was made could be made to put Mrs. Evans out of the
apartment. That the apartment was cleaned away until about
the first of that month. The defendant testified that on

when his wife left the apartment on the 10th of December, he went to a hotel, Mrs. Krause remaining at the apartment; that when his wife returned on about the 21st of that month, he packed up his belongings and left, refusing to live with his wife. There is other evidence in the record tending to show that from July, 1919, there was trouble between complainant and the defendant on account of Mrs. Krause. The defendant and Mrs. Krause both testified and, of course, denied any improper relations.

The chancellor found that Mrs. Krause was living with the parties in their home and that her actions and conduct rendered the life of the complainant Clara Louise Uebels miserable, and her living in said home unendurable; that the complainant Clara Louise Uebels objected to the said Stella Krause remaining in their home, and on many occasions quarreled with the defendant " * * over the presence in their home of the said Stella Krause; that despite the objections of said complainant " * * the defendant insisted that Stella Krause remain in said home, and that the said Stella Krause did remain in said home until about December 19, 1921."

There is other evidence in the record to which we have not adverted, tending to show that the finding of the chancellor above quoted was entirely justified. Both the defendant and Mrs. Krause testified that in July, 1919, Mr. Krause charged the defendant with having improper relations with his wife and yet she continued to live in the house a long time afterwards over the protests of the complainant and with the entire approval of the defendant.

Counsel for the defendant contends that the evidence fails to show that the relations between the defendant and Mrs. Krause were improper and counsel for the complainant in reply thereto say "we agree with counsel, and at this point we desire to say that we do not claim there is in the record any evidence that there was any illicit intercourse between Mr. Uebale and Mrs. Krause." Upon a careful consideration of all the evidence in the record, we think it plain that counsel for the complainant are entirely too modest in their contentions. We are of the opinion that the evidence clearly shows that the relations between the defendant and Mrs. Krause continuing to live together in the apartment with the complainant over the latter's protest, was scandalous and to contend, as the defendant does, that the evidence is insufficient to support the decree is to ignore the facts established by the evidence. No decree could stand, except one in favor of the complainant. The finding of the chancellor was the only finding that could be made, consistent with the evidence.

The defendant contends that the allegations of the bill are insufficient to support the decree, because there is no allegation that the complainant was living separate and apart from her husband without her fault as the statute requires. The law does not require the allegation to be in the words of the statute. It is sufficient if it appears from the allegations of the bill that complainant was living separate and apart from her husband without her fault. The amended bill alleges inter alia that the defendant brought into their home Mrs. Krause

...for the defendant contends that the evidence
...to show that the relations between the defendant
...and Mrs. Evans were improper and immoral for the com-
plainant in reply thereto say "we agree with counsel, and
at this point we desire to say that we do not claim there
is in the record any evidence that there was any illicit
intercourse between Mr. Leblanc and Mrs. Evans." Upon
a careful examination of all the evidence in the record,
we think it plain that counsel for the complainant are
entirely too modest in their assertions. We are of the
opinion that the evidence clearly shows that the relations
between the defendant and Mrs. Evans continued to live
together in the apartment with the complainant over the
defendant's protest, was scandalous and so contrary, as the
law does, that the evidence is insufficient to
support the charge is to ignore the facts established by
the evidence. No doubt could stand, except was in favor
of the complainant. The finding of the chancellor was
the only finding that could be made, consistent with the
evidence.

The defendant contends that the evidence of
the bill and exhibition is sufficient to support the charge, because
there is no allusion in that the complainant was living
separately and apart from her husband without her knowledge
on the witness' testimony. The law does not require the
allegation to be in the words of the statute. It is
sufficient if it appears from the allegations of the bill
that complainant was living separately and apart from her
husband without his knowledge. The amended bill alleges that
she that the defendant brought into their home Mrs. Evans

and that afterwards he became more intimate with her than his duties as husband of the complainant would permit; that in July, 1919, Mrs. Krause's husband accused the defendant of having illicit relations with his wife; that Krause afterwards obtained a divorce on the grounds of desertion because of such intimacy; that afterwards the defendant continued his intimate relations with Mrs. Krause, despite complainant's objections; that defendant made gifts to her and made the Yellowstone Park trip above referred to; that on account of the conduct of the defendant toward the complainant, the complainant on December 10th left her home and took refuge with her sister for fear that the defendant would beat her again as he had done on the evening of the 8th of December; that she then returned on the 21st of December, after consulting with counsel and, thereupon, the defendant packed his belongings and left, and from that date willfully deserted and absented himself from the complainant without reasonable cause. We think these allegations are sufficient to sustain a decree finding that complainant was living separate and apart from her husband without her fault. There is no merit in defendant's contention that the court should have awarded him a decree of divorce under his crossbill, which charged that complainant had willfully deserted him on December 8, 1921, without fault on his part.

Upon a careful consideration of the entire record, we are clearly of the opinion that the decree of the chancellor was fully warranted by the evidence and that no other decree could stand in a court of review based upon the evidence.

and that defendant be removed from custody with her child
his duties as husband of the complainant would permit; that
in July, 1912, Mrs. Kennedy's husband advised the defendant
of having in fact relations with his wife; that Kennedy
thereupon obtained a divorce on the grounds of desertion
because of such intimacy; that afterwards the defendant
continued his intimate relations with Mrs. Kennedy, causing
complaints to be made; that defendant made efforts to
have her made the Yellowstone Park trip above referred to;
that in regard to the conduct of the defendant toward
the complainant, the complainant on December 10th left
her home and took refuge with her sister for two days
the defendant would have been with her had she not been
on account of the 15th of December; that she then returned on
the 16th of December, after making this report to
the court, the defendant packed his belongings and left
and that date willfully deserted and abandoned himself
from the complainant without reasonable cause, in that
these allegations are sufficient to sustain a decree find-
ing that complainant was living separate and apart from
her husband without her fault. There is no merit in the
defendant's contention that the court should have awarded
him a divorce under his exception, which charges
that defendant had willfully deserted him on December
15th, without fault on his part.

There is a further allegation of the complainant
on the 15th of December that she learned of the defendant
and fully intended to the witness and that on other days
there was in a state of mind that she was not satisfied.

We think the appeal in this case is wholly without merit.

The decree of the Circuit Court of Cook County
is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

92 - 30348

ALBERTINE HAWKINS,

Appellee,

v.

ARCADE CLEANER & DYER CO.,
a corp.,

Appellants.)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

241 I.A. 607

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff sued the defendants to recover \$68.40,
being the value of a dress which she had delivered to the
defendants for cleaning, but which had not been returned
to her. On the 6th of March, 1925, the case was tried
before the court without a jury and after hearing the
evidence and arguments of counsel, there was a finding
in favor of plaintiff for the amount of her claim. Judg-
ment was entered on the finding and the Arcade Cleaner &
Dyer Company, hereinafter referred to as the defendant,
was allowed an appeal. Thereafter on March 27th, the
court, on motion of the defendant, vacated and set aside
the judgment and on April 24, 1925, the case was again
heard before the court without a jury, and there was again
a finding and judgment against both defendants for \$68.40
and the defendant appeals. So far as the record discloses
the defendant Ford, did not appear at the trial and has
not appealed from the judgment entered against him.

At the commencement of the trial, the record
discloses that the court stated that after the first trial

APPELLATE DIVISION

APPEALS

APPEALS FROM

MUNICIPAL COURT

OF CHICAGO

ARGUMENTS & BRIEFS

IN

APPELLATE

2411.A.607

Opinion filed March 10, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

Plaintiff sued the defendant to recover \$23.40, being the value of a dress which she had delivered to the defendant for cleaning, but which had not been returned to her. On the 28th of March, 1935, the case was filed before the court without a jury and after hearing the evidence and arguments of counsel, there was a finding in favor of plaintiff for the amount of her claim. This amount was entered on the finding and the decree was entered. The defendant, however, petitioned for a writ of certiorari and asked the court to set aside the finding and decree and to grant her judgment and costs. The court, on April 14, 1935, the case was again heard before the court without a jury, and there was again a finding and judgment against the defendant for the amount of her claim. On April 24, 1935, the case was again heard before the court without a jury, and there was again a finding and judgment against the defendant for the amount of her claim. On April 24, 1935, the case was again heard before the court without a jury, and there was again a finding and judgment against the defendant for the amount of her claim.

is the recommendation of the trial court.

Plaintiff asks the court to grant her the sum of \$23.40.

of the case, there was some trouble about settling the bill of exceptions and to obviate this difficulty, suggested that the judgment be vacated and the case again tried so that the defendant might have a court reporter at the trial to take down the proceedings and thus to have a bill of exceptions in case there was an appeal taken from whatever judgment might be entered on the second trial.

The evidence tends to show that on or about April 29, 1924, plaintiff delivered the dress in question to the defendant Ford at his place of business No. 3756 Indiana avenue, Chicago, for the purpose of having it cleaned and pressed, and that Ford, as was his custom, delivered it to the defendant, Arcade Gleaner and Dyer Company, who was equipped to do the work required; that some days thereafter plaintiff called at the establishment on Indiana avenue but was unable to obtain her dress and after calling a number of times, she was advised that it had been delivered to the Arcade Gleaner and Dyer Company. Thereupon she called on the latter company six or eight times in an endeavor to obtain her dress. Their place of business was located at No. 510 West 31st street, Chicago. The plaintiffs evidence further shows that when plaintiff called at this latter address, the party in charge of the office told plaintiff that they had had the dress but that it had been lost, and that the Arcade Gleaner and Dyer Company would pay for the dress, but not more than \$15.00. Plaintiff refused to accept this amount and brought suit for the value of

the dress.

For the defendant, Nicholas Biever, testified that he worked for the defendant, driving a wagon, collecting and re-delivering goods; that he called at No. 3756 Indiana avenue to obtain from the person running that establishment, whose name was said to be Andrews and not Ford, such garments as were required to be cleaned at the defendant's place of business and that he afterwards returned all of them. He further testified that he kept a record of the articles thus received and delivered by recording the same in a book, which later had been destroyed because all of the goods referred to in the book had been properly returned. During the testimony of this witness the court said that he would only be permitted to testify concerning the particular dress in question and that since the witness could not recall that dress, he would not consider the evidence given by the witness. Theodore Biever, President of the defendant company, testified that he never received the dress in question; that the defendant did business with the tailor shop at No. 3756 Indiana avenue; that the proprietor's name, of that establishment, was Andrews; that he never did any business with the defendant Ford. Magdalene Biever testified that she was employed by the defendant and was the only person in charge of the latter's place of business; that she took in and gave out all garments handled by the defendant; that she did not have any conversation with the plaintiff in which it was stated that the defendant had lost the dress but would pay for it.

[illegible]

Plaintiff testified in rebuttal that the witness Magdalene Biever was not the person in defendant's establishment to whom plaintiff talked concerning her dress. A witness for the plaintiff also testified that the value of the dress was \$68.40.

The only argument made by the defendant is the following: "The statement of the case carries its own argument with it so far as the question of liability goes. No privity of contract between plaintiff and defendant, Arcade Dyer & Cleaner Co. is shown. If, when, how or for what purpose the Arcade Dyers & Cleaners Co. received the dress does not appear. It does appear without contradiction, however, that the Arcade Dyer & Cleaner Co. never had any business whatever with the defendant Ford. The judgment cannot be predicated upon any theory of a conscientious finding based on the evidence. It can only be explained by the arbitrary, unreasonable and erroneous conduct of the trial judge as a result of passion or prejudice, as evidenced by his conduct as shown on pages 5 and 6 of the abstract. His refusal to permit Mr. Weremine to make a record is of itself reversible error." There is no merit in the contention that there is no privity of contract between plaintiff and the defendant. There was evidence tending to show that the defendant had received plaintiff's dress for the purpose of cleaning and pressing it; that it was lost and that they agreed to pay plaintiff \$15.00 for it. The fact that the defendant did not know Ford, to whom plaintiff testified she delivered her dress at the

Exhibit 12 consisted in receipt from the witness
Herman Blower was not the person in defendant's handwriting
want to whom plaintiff failed concerning her dress. A wit-
ness for the plaintiff also testified that the value of the
dress was \$25.00.

The only argument made by the defendant is the
following: "The statement of the dress maker is an
argument with it as far as the question of liability goes.
In view of contract between plaintiff and defendant,
Annette Spurr A. Spurr, 17, when, how as for
what appears the dress from A. Spurr, 17, received the
dress does not appear. It does appear without contradiction,
however, that the dress from A. Spurr, 17, never has any
business whatever with the defendant. The defendant
cannot be held liable upon any theory of a conspiracy.
Finding weakness in evidence. It can only be maintained
by the plaintiff, unnecessary and excessive conduct of
the trial judge as a result of prejudice or passion, as
evidenced by his conduct as shown on pages 5 and 6 of the
record. His refusal to permit Mr. Peterson to make a
motion is an illegal reversible error. There is no merit
in the contention that there is no injury of conduct
between plaintiff and the defendant. There was no error
leading to show that the defendant had received plaintiff's
dress for the purpose of taking and wearing it; that it
was not that they agreed to get plaintiff's dress for
it. It is not that the defendant did not know that, as
now plaintiff sought the delivery her dress to the

Indiana avenue address is of no consequence because the undisputed evidence shows that plaintiff delivered her dress to the tailor shop at No. 3756 Indiana avenue with which the defendant did business. Whether the individual at Indiana avenue was Ford or Andrews so far as this appeal is concerned is not material as Ford is making no complaint. The point made that the court did not permit counsel for the defendant, Mr. Wermine, to make a record and that this is such an error as to warrant a reversal is without merit. The driver of the wagon testified as to what he did in the way of collecting and returning garments to the Indiana avenue shop and as to the method of keeping the record of the transactions in a book. The court erroneously refused to consider this evidence unless the witness could testify concerning the particular dress in question, but no complaint is made of that ruling in the argument. The evidence of course, was admissible as tending to show that the defendant had not lost the garment in question. This would appear from the evidence of the witness to the effect that all the garments he had collected from the Indiana avenue shop had been returned. The weight to be given to this evidence was an entirely different matter, but it was certainly competent, but as stated, no argument is made on this point. The court refused to permit counsel to make a statement of what he proposed to prove by the witness, the driver of the wagon and this was entirely proper. The court pointed out that the proper method of doing this was to ask the witness questions. We think, however, from the record, that all that this witness knew

Indian women witness in 7 or 8 instances the undoubted evidence shows that plaintiff delivered box found in the Indian shop at No. 3728 Indian Avenue with which the defendant did business. Whether the individual at Indian Avenue was found by witness on the day this appeal is concerned is not material as there is nothing in dispute. The point made that the court will not grant summary for the defendant was wanting to make a record and that this is such an error as to warrant a reversal in without costs. The driver of the wagon testified on to whom he did in the way of collecting and returning garments to the Indian women shop and as to the method of inspecting the record of the transaction in a book. The court expressly refused to order after this evidence which the witness could testify concerning the transaction known in question, but no explanation is made of what ruling in the argument. The witness of course, was admitted as tending to show that the defendant had not lost the garment in question. This would appear from the evidence of the witness to the effect that all the garments he had collected from the Indian Avenue shop had been returned. The weight to be given to this evidence was an entirely different matter, but is one entirely uncontroverted, but as stated, no argument is made on this point. The court refused to grant summary as a statement of what he proposed to prove by the witness, the driver of the wagon and this was entirely proper. The court pointed out that the proper method of doing this was at the time of the deposition, as stated, from the record, that all that this witness knew

-6-

about the case sufficiently appears.

The judgment of the Municipal Court of
Chicago is affirmed.

AFFIRMED.

THOMPSON, P. J. AND TAYLOR, J. CONCUR.

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109 - 30367

PETER PINOIAK,

Appellant,

v.

WOJCIECH HENBERG,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 607

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On December 5, 1924, judgment by confession was entered in favor of plaintiff against the defendant of a promissory note for \$242.29, the same being made up of three items (1) balance due on the note, \$203.98; (2) interest on the note \$3.41 and (3) attorneys' fees \$35.00. The note was dated August 23, 1924, made by the defendant, payable to the order of the plaintiff, and due three months after date for \$252.88. On January 12, 1925, defendant filed a petition wherein he set up that shortly before August 23, 1924, plaintiff did some electrical and plumbing work for the defendant for which plaintiff was to be paid by the defendant \$253.88; that on August 23, 1924, plaintiff presented an itemized statement to the defendant, showing that the defendant owed plaintiff for electrical work \$205.12 and for plumbing \$48.76, or a total of \$253.88. The petition further set up that in consideration of the work done, the defendant on August 23,

241 I.A. 608

Opinion filed March 10, 1908.

THE COURT OF COMMONS delivered the opinion of

the court.

On December 11, 1907, judgment by confession

was entered in favor of plaintiff against the defendant

on a promissory note for \$250,000, the same being made

on or about March 11, 1907, between the defendant and the

plaintiff, the note was issued to the plaintiff by the

defendant, payable to the order of the plaintiff, and

the same was duly cashed by the plaintiff on January 11,

1908, following which a petition was filed by the

plaintiff against the defendant for the recovery of the

amount of the note, with interest and costs.

The defendant moved for the judgment of the court

on the ground that the note was not duly cashed

by the plaintiff, and that the same was not

received by the plaintiff until after the expiration of

the time specified in the note for its payment.

The court held that the note was duly cashed

by the plaintiff, and that the same was received

1924, made and delivered to plaintiff the judgment note for \$253.88, being the same note upon which judgment was confessed; that afterwards on November 1st, defendant paid plaintiff \$130.00, on account of indebtedness, and plaintiff on that date gave him a receipt for the \$130.00. Defendant moved the court to open up the judgment and for leave to defend, and on the same day, January 12, 1925, an order was entered opening the judgment and giving the defendant leave to defend and it was further ordered that the petition stand as defendant's affidavit of merits.

On February 25, 1925, the cause came on for hearing before the court without a jury and after hearing the evidence and argument of counsel, the court found in favor of plaintiff for \$123.88, and judgment was entered for this amount, and it is to reverse this judgment that plaintiff appeals.

On the trial the defendant offered in evidence the itemized statement which plaintiff gave him August 23, 1924, above mentioned. He also offered in evidence the receipt for \$130.00 which plaintiff gave him on November 1st, as above stated. Thereupon plaintiff testified that he did electrical and plumbing work for the defendant, for which there was due him from the defendant \$333.88; that this work was done during July, 1924 and afterwards he called on defendant for payment, a number of times, but that defendant was unable to pay and finally on August 23, 1924, plaintiff again called on the defendant and demanded payment of the \$333.88; that the defendant at that time paid him \$80.00 on account and then made and delivered the judgment note for \$253.88; that thereupon plain-

1934, made and delivered to plaintiff the judgment note for \$200.00, being the amount upon which judgment was rendered; that defendant on November 1st, defendant paid plaintiff \$100.00, on account of indebtedness, and plaintiff on that date gave him a receipt for the \$100.00. Defendant moved the court to set up the judgment and for leave to defend, and on the same day, January 11, 1935, an order was entered granting the judgment and giving the defendant leave to defend and it was further ordered that the position stand as defendant's affidavit of merits.

On February 26, 1935, the same case on for hearing before the court without a jury and after hearing the evidence and argument of counsel, the court found in favor of plaintiff for \$100.00, and judgment was entered for this amount, and it is so reversed this judgment that plaintiff appeals.

On the trial the defendant offered in evidence the attached statement which plaintiff gave the court on November 1st, 1934. He also offered in evidence the receipt for \$100.00 which plaintiff gave him on November 1st, 1934. Plaintiff stated, however, plaintiff testified that he did not deliver and placing with him the defendant, for which there was due the sum of \$200.00; that this note was given to him on November 1st, 1934, and was delivered to him on November 1st, 1934. A verdict at that time, but the defendant was unable to pay and plaintiff on August 11, 1934, plaintiff again called on the defendant and requested payment of the \$200.00, but the defendant refused to pay the \$200.00 on account of the note and the defendant delivered the judgment note for \$200.00; that thereafter plaintiff

tiff gave the itemized statement to the defendant, showing the balance then due of \$253.68. As stated plaintiff testified specifically that he was paid the \$80.00 before he delivered, to the defendant, the itemized statement. He further testified that on November 1, 1924, the defendant paid him \$50.00 more and at that time defendant requested a receipt for this \$50.00 as well as for the \$80.00 which had been paid August 23rd, and in compliance with this request, plaintiff made out the receipt for \$130.00. The record further shows that plaintiff then called the defendant as a witness and the defendant testified that \$80.00 was paid on August 23rd, 1924, and \$50.00 on November 1st following and that on the latter date the plaintiff gave the defendant the receipt for \$130.00. This was all the evidence in the record.

From the foregoing it will be seen that the only substantial question in dispute between the parties was whether plaintiff on August 23rd delivered to the defendant the itemized statement before defendant paid the \$80.00 or whether the \$80.00 was paid afterwards. Plaintiff's testimony is to the effect that the payment of the \$80.00 preceded the delivery of the itemized statement by him, while the defendant's position was that plaintiff presented the itemized statement showing the amount due to be \$253.68 and then defendant paid \$80.00 as stated. The court adopted the defendant's version of the matter and judgment was entered accordingly. In this we think the court was in error and apparently this was occasioned by the fact that on the trial the fact that defendant had given plaintiff his note

for \$253.88 was overlooked.

The undisputed evidence is that the defendant paid \$80.00 on August 23, 1924, and that he also gave plaintiff the note on that date for \$253.88. It seems obvious that if the \$80.00 was to be deducted from the \$253.88, which would leave a balance of \$173.88, defendant would not have given a note for the \$253.88. This fact was not brought to the attention of the trial court at all, nor is it mentioned in the brief filed on behalf of plaintiff, but it seems to us conclusive and establishes that on August 23, 1924, after defendant had paid \$80.00 on account, he still owed plaintiff \$253.88, and then made his note for that amount and gave it to the plaintiff. Any other deduction to be drawn from the evidence in our opinion would be entirely unwarranted. It follows, therefore, that the court on February 25th when the case was heard should have confirmed the judgment for \$242.29, which was the amount for which the judgment had been confessed.

The judgment of the Municipal Court of Chicago is reversed and judgment will be entered in this court in favor of plaintiff and against the defendant for \$242.29.

JUDGMENT REVERSED AND JUDGMENT ENTERED IN THIS COURT.

THOMSON, F. J. AND TAYLOR, J. CONCUR.

for 1935, 36 was overlooked.

The unadjusted balance is for the balance

and 1935, 36 on August 31, 1935, and that he also gave testimony

the same on that date for 1935, 36. It seems obvious that it

and 1935, 36 was to be deducted from the 1935, 36, which would

leave a balance of 1935, 36, defendant would not have given

a note for the 1935, 36. This fact was not brought to the

attention of the trial court at all, nor is it mentioned in

the trial record or exhibits. It is also to be

on exhibits and testimony that on August 31, 1935,

after defendant had paid 1935, 36 on account, he still owed

plaintiff 1935, 36, and that was his note for that amount

and gave it to the plaintiff. Any other deduction to be

shown from the evidence in our opinion would be entirely

unwarranted. It follows, therefore, that the court on

February 1936 and the same was found should have continued

the account for 1935, 36, which was the amount for which the

defendant was liable.

The balance of the plaintiff's debt on August 31,

1935, was 1935, 36, which was the amount for which the

defendant was liable and should have been paid.

It is respectfully suggested that the court should be

reversed and the judgment set aside.

118 - 30376

MARSHALL FIELD & COMPANY,
a Corporation,

Appellee,

v.

WIELAND DAIRY COMPANY,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 607

Opinion filed March 10, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

By this appeal the defendant seeks to reverse
an order of the Municipal Court of Chicago overruling
its motion to vacate the judgment theretofore entered
against the defendant.

The record discloses that on November 30, 1933,
plaintiff brought suit in the Municipal Court of Chicago
against the defendant to recover damages claimed to have
been occasioned by the negligent operation of an automobile
belonging to the defendant, which collided with one of
plaintiff's automobiles damaging it. Suit was brought to
enforce payment of the amount plaintiff was required to
expend in repairing the damages and for loss of the use
of the automobile. Summons was issued on the 30th of
November, returnable at 9:30 A.M. sharp on the 11th of
December, 1933. It was served on the defendant December
1, 1933. At 3:38 o'clock in the afternoon of December

HARRISON FIELD & COMPANY
A CORPORATION

Appellants

VERSUS

THE CHIEF OF POLICE

THE CHIEF OF POLICE
A CORPORATION

341 I.A. 607

Opinion filed March 10, 1932.

By this appeal the defendant seeks to reverse
an order of the Municipal Court of Chicago overruling
the verdict to return the judgment therefore entered
against the defendant.

The record discloses that on November 20, 1931,
plaintiff brought suit in the Municipal Court of Chicago
against the defendant to recover damages claimed to have
been occasioned by the negligent operation of an automobile
belonging to the defendant, which collided with one of
plaintiff's automobiles traveling in the same direction.
The record further discloses that the defendant was
found to be negligent in the operation of the automobile
and was liable for the damages claimed by the plaintiff.
The record also discloses that the defendant was
found to be negligent in the operation of the automobile
and was liable for the damages claimed by the plaintiff.
The record also discloses that the defendant was
found to be negligent in the operation of the automobile
and was liable for the damages claimed by the plaintiff.

11th, defendant filed its appearance, a demand for a jury trial and an affidavit of merits wherein the defendant set up facts tending to show a defense to plaintiff's action. The record shows that on December 11, 1923, an order was entered defaulting the defendant for want of appearance. Nothing further appears to have been done until December 31, 1924, which was more than a year afterwards, when the record discloses that the cause came on for hearing in the regular course before the court without a jury, the defendant being absent. There was a finding that the defendant was guilty as charged in the statement of claim and the damages were assessed at \$924.00. Judgment was entered on the finding. The bill of exceptions, shows that defendant filed a petition on February 26, 1925, praying that the judgment and default be vacated and it be permitted to defend the case on its merits. The plaintiff demurred to the petition and the prayer of the petition was denied and the defendant appeals.

The question whether the action of the court was erroneous must be determined from the face of the petition. The petition set up that the defendant had been defaulted on December 11, 1923, the return day of the summons in the cause; that more than twelve months thereafter, viz. December 31, 1924, judgment was entered in favor of the plaintiff and against defendant for \$924.00; that the defendant did not learn of the default or judgment until February 3, 1925, when a demand for payment was made under an execution. The petition further set up that the defendant filed its appear-

1935, defendant filed its appearance, a hearing for a jury trial and an affidavit of service wherein the defendant set up facts tending to show a defense to plaintiff's action. The record shows that on November 11, 1935, an order was entered directing the defendant to wait at appearance. Plaintiff further appears to have been duly summoned. On 21, 1935, which was more than a year afterwards, when the record discloses that the same was on for hearing in the regular course before the court without a jury, the defendant and being absent. There was a finding that the defendant was guilty as charged in the statement of claim and the judgment was entered at \$254.00. Judgment was entered on the finding. The bill of exceptions, shows that defendant filed a petition on February 22, 1936, praying that the judgment and verdict be vacated and it be permitted to set aside the case on its merits. The plaintiff demurred to the petition and the prayer of the petition was denied and the judgment affirmed.

The question whether the action of the court was proper or not is presented. The bill of exceptions shows that the petition was filed on February 22, 1936, the seventh day of the month in the year. That more than twelve months thereafter, viz. December 31, 1936, judgment was entered in favor of the plaintiff and against defendant for \$254.00; that the defendant did not file a bill of exceptions until February 3, 1937, and a hearing for judgment was made under an objection. The petition praying that the judgment be set aside was filed

ance and a demand for a jury trial on the return day of the summons, viz. December 11, 1923, and was led to believe, under the practice of the Municipal Court, that the case would be put on the next jury calendar, as the word "jury" was stamped on the wrapper containing the files of the cause; that a representative of counsel for the defendant investigated the files in the office of the clerk of the Municipal Court to ascertain when the case would come up for trial, and upon seeing that a jury trial had been demanded and the word "jury" stamped on the wrapper of the files, he procured a printed calendar of the Municipal Court, which contained a list of all the cases that were to be tried by a jury; that this was done before the judgment was entered December 31, 1924; that upon examination of the printed calendar, the cause did not appear in the calendar which was published in February, 1924, and it was assumed that since the cause did not appear in that calendar, it would go over until the next printed jury calendar, and that no other calendar had been printed since February, 1924; that relying on these facts the defendant did not learn of the default or judgment until more than thirty days after December 31, 1924, the date on which the judgment was entered. The petition further set up that the defendant used all diligence possible to ascertain the date of the trial; that there was no reference to the case either in the jury calendar or the Municipal Court Bulletin and, therefore, defendant thought the case would not be called until a much later date; that no notice was ever served on it or its counsel as to the taking of the default or judgment and that

was not a demand for a jury trial on the return day of the
 summons, viz. December 11, 1903, and was not to believe
 under the practice of the Municipal Court, that the case
 would be put on the next day without, as the word "jury"
 was stamped on the wrapper containing the list of the
 names; that a representative of counsel for the defendant
 investigated the list in the office of the clerk of the
 Municipal Court to ascertain when the case would come up
 for trial, and upon seeing that a jury trial had been
 demanded and the word "jury" stamped on the wrapper of the
 list, he procured a printed calendar of the Municipal
 Court, which contained a list of all the cases that were
 to be tried by a jury; that this was done before the jury
 was returned December 21, 1904; that upon examination
 of the printed calendar, the name did not appear in the
 calendar which was published in February, 1904, and it was
 assumed that since the name did not appear in that calendar,
 it would go over until the next printed jury calendar, and
 that no other calendar had been printed since February,
 1904; that relying on these facts the defendant did not learn
 of the default or judgment until some time after the
 return of the jury, viz. 1904, because he knew the judgment
 was return. The official calendar was up then and it was
 not all diligent practice to ascertain the date of the
 trial; that there was no reference to the case either in the
 City Council or Municipal Court books and, therefore,
 defendant thought the case would not be called until a
 date later than that on which he was served as is on the
 record as is the custom of the courts of judgment and law.

the defendant had a meritorious defense as set forth in its affidavit of merits.

It is unfortunate that this case was not tried upon its merits. To warrant the court in vacating a judgment where the motion is made more than thirty days after the judgment is entered, the defendant must show two things: diligence and a meritorious defense. In the instant case the petition fails to show diligence. On the contrary, we think it shows that the defendant was negligent. The summons served on it was returned at 9:30 A.M. on the 11th of December, 1923, but the defendant did not file its appearance until 3:38 P.M. on that date. Under the law it knew that the case would be called at 9:30 or as soon thereafter as the business of the court would warrant, and it was further charged with notice that under the law, it would be defaulted in case it did not appear when the case was called or have an affidavit on file. Filing the appearance at 3:38 in the afternoon certainly does not show diligence. Moreover, when counsel for the defendant examined the jury calendar of February, 1924, and found that the case was not on that calendar, this should have put counsel on notice that something was wrong. If he had then examined the records it would have disclosed that the defendant had been defaulted on the 11th of December, and he then could have had the default vacated, because the judgment was not entered for many months afterwards.

The defendant having failed to show that it was in the exercise of diligence, the order of the Municipal Court appealed from must be affirmed.

AFFIRMED.

THOMPSON, F.J. AND TAYLOR, J. CONCUR.

The defendant had a right to be heard in the
trial of the case.

It is understood that this case was not tried

upon the merits. To prevent the court in reaching a judgment

where the action is made more than twenty days after

the judgment is entered, the defendant must show two things:

allegation and a verification of same. In the instant case

the position taken by the defendant is, on the contrary, no

think it shows that the defendant was negligent. The court

ruled on it was returned at 2:30 A.M. on the 11th of Dec-

ember, 1935, but the defendant did not file his appearance

until 3:30 P.M. on that date. Under the law it was held

the case would be called at 2:30 or so soon thereafter as

the business of the court would permit, and it was held

that because the matter was not tried, it was held

that the court was not to be bound by the rules and that

it was an error to say that, being the case, it was

in the defendant's hands and was his right, and that

the court was not to be bound by the rules and that

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122 - 30387

PAUL BUJAK AND SOPHIE BUJAK,

Defendants in Error.

v.

STANLEY GURA,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 607

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought an action of assumpsit against the defendant, seeking to recover \$3,000.00, claimed to be due for money loaned and for board and lodging of defendant and his family. The case was tried before a judge and a jury and there was a verdict rendered in plaintiffs' favor for \$3,278.75. From this plaintiffs remitted \$278.75, so as to bring the amount within the ad damnum, judgment was then entered in plaintiffs' favor for \$3,000.00 and the defendant appeals.

The record discloses that plaintiffs are husband and wife and the defendant their son-in-law who married their daughter in 1916 in Minnesota, where they were all living at that time; that afterwards they all moved to Wisconsin where plaintiffs bought a small farm as did also the defendant. Later on the defendant moved to Detroit and the farms not proving successful, all of the parties moved to Chicago. Plaintiffs offered evidence tending to show that after the defendant married their daughter they from time

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

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THE STATE OF NEW YORK, ss: I, the undersigned, a Justice of the Supreme Court, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the files of the said Court.

1970-1971 1972-1973 1974-1975 1976-1977 1978-1979 1980-1981 1982-1983 1984-1985 1986-1987 1988-1989 1990-1991 1992-1993 1994-1995 1996-1997 1998-1999 2000-2001 2002-2003 2004-2005 2006-2007 2008-2009 2010-2011 2012-2013 2014-2015 2016-2017 2018-2019 2020-2021 2022-2023 2024-2025 2026-2027 2028-2029 2030-2031 2032-2033 2034-2035 2036-2037 2038-2039 2040-2041 2042-2043 2044-2045 2046-2047 2048-2049 2050-2051 2052-2053 2054-2055 2056-2057 2058-2059 2060-2061 2062-2063 2064-2065 2066-2067 2068-2069 2070-2071 2072-2073 2074-2075 2076-2077 2078-2079 2080-2081 2082-2083 2084-2085 2086-2087 2088-2089 2090-2091 2092-2093 2094-2095 2096-2097 2098-2099 2100-2101 2102-2103 2104-2105 2106-2107 2108-2109 2110-2111 2112-2113 2114-2115 2116-2117 2118-2119 2120-2121 2122-2123 2124-2125 2126-2127 2128-2129 2130-2131 2132-2133 2134-2135 2136-2137 2138-2139 2140-2141 2142-2143 2144-2145 2146-2147 2148-2149 2150-2151 2152-2153 2154-2155 2156-2157 2158-2159 2160-2161 2162-2163 2164-2165 2166-2167 2168-2169 2170-2171 2172-2173 2174-2175 2176-2177 2178-2179 2180-2181 2182-2183 2184-2185 2186-2187 2188-2189 2190-2191 2192-2193 2194-2195 2196-2197 2198-2199 2200-2201 2202-2203 2204-2205 2206-2207 2208-2209 2210-2211 2212-2213 2214-2215 2216-2217 2218-2219 2220-2221 2222-2223 2224-2225 2226-2227 2228-2229 2230-2231 2232-2233 2234-2235 2236-2237 2238-2239 2240-2241 2242-2243 2244-2245 2246-2247 2248-2249 2250-2251 2252-2253 2254-2255 2256-2257 2258-2259 2260-2261 2262-2263 2264-2265 2266-2267 2268-2269 2270-2271 2272-2273 2274-2275 2276-2277 2278-2279 2280-2281 2282-2283 2284-2285 2286-2287 2288-2289 2290-2291 2292-2293 2294-2295 2296-2297 2298-2299 2300-2301 2302-2303 2304-2305 2306-2307 2308-2309 2310-2311 2312-2313 2314-2315 2316-2317 2318-2319 2320-2321 2322-2323 2324-2325 2326-2327 2328-2329 2330-2331 2332-2333 2334-2335 2336-2337 2338-2339 2340-2341 2342-2343 2344-2345 2346-2347 2348-2349 2350-2351 2352-2353 2354-2355 2356-2357 2358-2359 2360-2361 2362-2363 2364-2365 2366-2367 2368-2369 2370-2371 2372-2373 2374-2375 2376-2377 2378-2379 2380-2381 2382-2383 2384-2385 2386-2387 2388-2389 2390-2391 2392-2393 2394-2395 2396-2397 2398-2399 2400-2401 2402-2403 2404-2405 2406-2407 2408-2409 2410-2411 2412-2413 2414-2415 2416-2417 2418-2419 2420-2421 2422-2423 2424-2425 2426-2427 2428-2429 2430-2431 2432-2433 2434-2435 2436-2437 2438-2439 2440-2441 2442-2443 2444-2445 2446-2447 2448-2449 2450-2451 2452-2453 2454-2455 2456-2457 2458-2459 2460-2461 2462-2463 2464-2465 2466-2467 2468-2469 2470-2471 2472-2473 2474-2475 2476-2477 2478-2479 2480-2481 2482-2483 2484-2485 2486-2487 2488-2489 2490-2491 2492-2493 2494-2495 2496-2497 2498-2499 2500-2501 2502-2503 2504-2505 2506-2507 2508-2509 2510-2511 2512-2513 2514-2515 2516-2517 2518-2519 2520-2521 2522-2523 2524-2525 2526-2527 2528-2529 2530-2531 2532-2533 2534-2535 2536-2537 2538-2539 2540-2541 2542-2543 2544-2545 2546-2547 2548-2549 2550-2551 2552-2553 2554-2555 2556-2557 2558-2559 2560-2561 2562-2563 2564-2565 2566-2567 2568-2569 2570-2571 2572-2573 2574-2575 2576-2577 2578-2579 2580-2581 2582-2583 2584-2585 2586-2587 2588-2589 2590-2591 2592-2593 2594-2595 2596-2597 2598-2599 2600-2601 2602-2603 2604-2605 2606-2607 2608-2609 2610-2611 2612-2613 2614-2615 2616-2617 2618-2619 2620-2621 2622-2623 2624-2625 2626-2627 2628-2629 2630-2631 2632-2633 2634-2635 2636-2637 2638-2639 2640-2641 2642-2643 2644-2645 2646-2647 2648-2649 2650-2651 2652-2653 2654-2655 2656-2657 2658-2659 2660-2661 2662-2663 2664-2665 2666-2667 2668-2669 2670-2671 2672-2673 2674-2675 2676-2677 2678-2679 2680-2681 2682-2683 2684-2685 2686-2687 2688-2689 2690-2691 2692-2693 2694-2695 2696-2697 2698-2699 2700-2701 2702-2703 2704-2705 2706-2707 2708-2709 2710-2711 2712-2713 2714-2715 2716-2717 2718-2719 2720-2721 2722-2723 2724-2725 2726-2727 2728-2729 2730-2731 2732-2733 2734-2735 2736-2737 2738-2739 2740-2741 2742-2743 2744-2745 2746-2747 2748-2749 2750-2751 2752-2753 2754-2755 2756-2757 2758-2759 2760-2761 2762-2763 2764-2765 2766-2767 2768-2769 2770-2771 2772-2773 2774-2775 2776-2777 2778-2779 2780-2781 2782-2783 2784-2785 2786-2787 2788

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These are the same as the ones in the previous section.

to time loaned him various sums of money for the purpose of assisting him in paying for the farm in Wisconsin and stocking it and for other purposes and that they boarded the defendant, his wife and three children for which they had not been paid in full. Plaintiffs also offered evidence tending to show that in July, 1920, they loaned the defendant \$1850.00 with which to pay a mortgage which was on defendant's house in Chicago.

Defendant denied that plaintiffs had loaned him any money at any time; denied that they had advanced the \$1850.00 with which to pay off the mortgage on his house and denied that defendant owed anything to plaintiff for the board of himself and family, but on the contrary, that defendant had paid for the board in full, and that he did not owe the defendant anything. The jury returned a verdict, after hearing the evidence, in plaintiffs' favor and against the defendant for \$3272.75 and after a remittitur by plaintiffs, judgment was entered on the verdict for \$3,000.00. At the close of the case the defendant requested the court to instruct the jury that plaintiffs could not recover on account of the item of \$1850. This motion was denied and the instruction refused.

The defendant contends that there is no evidence from which the jury could reasonably find that plaintiffs loaned, advanced or paid out any money to discharge the mortgage on defendant's property. And in support of this, it is said that while there was some evidence offered by plaintiffs tending to show that Mrs. Buja and her daughter the defendant's wife, Mrs. Gura gave some money to Frank E. Zajick,

which plaintiffs contend was in payment of the mortgage, yet there was no evidence as to the amount, nor was there any evidence to show what Zajicek did with the money or for what purpose he received it; that it did not appear that Zajicek was the holder of the mortgage. We think this contention is not sustained by the record. Moreover, it appears that when plaintiffs sought to prove some of these facts, defendant objected and the objection was erroneously sustained. In these circumstances, the defendant having induced the court to erroneously exclude evidence, it cannot now claim that there is no evidence on these points. Owen v. Orumbaugh, 228 Ill.380, 406; Hohl v. Brooks, 213 Ill. 134, 137; Erickson v. Svete, 200 Ill. App. 151,155. But we are also of the opinion that the evidence is sufficient.

All of the parties were of foreign nationality and seemed to have understood and spoken our language with difficulty. Paul Bujak testified that prior to July, 1930, the defendant on a number of occasions requested him to loan the defendant money with which to pay a mortgage of \$2,000.00 on defendant's house in Chicago; that at first plaintiff refused to loan the money, but in the latter part of June, 1930, consented and that he loaned him \$1850.00 at that time, giving the defendant one check for \$1525.27 on the American State Bank and \$324.73 in cash; that at that time plaintiffs lived at No. 1620 Loomis Street and the defendant and his family at No. 821 Hermitage Avenue, Chicago; that sometime after plaintiff loaned the defendant the \$1850.00, he requested the defendant to pay the same and that defendant on

which plaintiff's counsel was in payment of the mortgage,
but there was no evidence as to the amount, nor was there
any evidence as to whether he had with the money or
for what purpose he received it; that it did not appear
that he had with the money of the mortgage, he said.

The contention is not sustained by the record. However,

it appears that when plaintiff sought to prove some of

these facts, defendant objected and the objection was

sustained. In these circumstances, the defendant

has having included the court an erroneously made evidence.

It cannot now claim that there is no evidence on these

facts. Wright v. Wright, 200 Ill. 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

that

All of the parties were of foreign nationality

and seemed to have understood and spoken out language with

intelligibility. From which resulting that prior to July, 1900,

the defendant was a member of certain and requested him to join

the defendant with which to pay a mortgage of \$10,000, or

in defendant's name in which (and) to be a mortgage of \$10,000, or

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to be a mortgage of \$10,000, or to be a mortgage of \$10,000, or

each occasion promised to do so, but that he did not then have the money, but would have it when he made the sale of his house; that no part of this was ever paid by defendant. The witness further testified that he got the \$1500.00 which he loaned the defendant, when plaintiff traded his property in Minnesota for the Wisconsin farm; that this was the \$1500.00 he gave the defendant. On cross-examination, the witness testified that he did not go to the bank personally to withdraw the \$1550.00, but that his wife, Mrs. Bujak withdrew the money; that he came home at noon on July 2, 1920, and endorsed the check for \$1525.27, and that his wife and Mrs. Gura took the money with which to pay for the mortgage.

Frank E. Zajicek, called by plaintiffs, testified that he was engaged in the real estate business for about twenty years in Chicago; that he knew plaintiffs and the defendant and his wife. He was then asked this question: "Q. Do you know anything about a mortgage on the house of Mr. Gura. A. I do. (Counsel for defendant): I object to that. The Court: Sustained. Q. Did Mrs. Bujak and Mrs. Gura ever come to your place of business and leave some money with you?" The defendant objected and was sustained. Afterwards the court permitted the witness to answer the question and the witness answered that Mrs. Bujak and Mrs. Gura did leave some money with the witness and he was then asked how much they left with him. This was objected to by the defendant and the objection sustained. Counsel for plaintiffs then stated that his contention was that he had a right to show "that Mrs. Gura came there with Mrs. Bujak

and left the money with this man to pay off the mortgage on Mr. Gura's house and that Mrs. Gura talked with this gentleman in regard to those matters." And the court said "the door is in the same manner closed to you as it is to this defendant." These rulings were wrong. Plaintiffs were endeavoring to show that they drew \$1850.00 out of the bank and that Mrs. Bujak, one of the plaintiffs and the defendant's wife took it to the real estate man, Zajicek, to pay off the mortgage. This evidence was clearly competent. Plaintiffs further endeavored to show that defendant's wife talked with the witness Zajicek about obtaining a loan with which to pay the mortgage on the defendant's property, and this was objected to and the objection sustained. The witness was then asked: "Did Mrs. Bujak afterwards leave any money with you to pay off this loan?" Objection to this was sustained. The witness, Zajicek, was then asked: "Did you have the collection of the loan which was against the Gura's property?" And upon objection by defendant the witness was not permitted to answer. This was clearly competent. He was then asked: "Did you pay off the loan on the Gura property, the mortgage on the Gura property?" This was objected to and the objection sustained. All of these objections should have been overruled and the defendant having brought about these erroneous rulings, cannot now contend that evidence on these points were not fully brought out. This witness further testified that after the defendant's wife died, he at the request of plaintiffs, went to see the defendant to endeavor to secure payment of the loan with which the mortgage had

been paid. He testified that he saw the defendant and asked him for the money; that the defendant said he owed the money, but would not be able to pay until he sold his house; that the amount mentioned at that time was nineteen hundred and some dollars, which the defendant agreed to pay as soon as he sold his property.

Joseph Kolin also testified that at the plaintiffs' request he called on the defendant in October, 1920, after the death of the latter's wife, to collect the money or to obtain a mortgage on defendant's house; that the defendant refused to give a mortgage, but stated that he owed the plaintiffs the money.

Plaintiff, Sophie Hujak, testified through an interpreter that on the second of July, 1920, she went to the bank and drew out some money and that she and Mrs. Gura took the money to Zajlock at his place of business and handed it to him. She was then asked: "Where did you get this money that you took to Mr. Zajlock's office?" This was objected to and the objection erroneously sustained. The witness further testified that the defendant had a few days prior to July asked her to loan him the money with which to pay off the mortgage; that this was a few days before this mortgage was paid off. Upon objection the court struck out this answer. The answer was clearly proper. She further testified that afterwards she requested defendant to pay back the money which he agreed to do as soon as he sold his house. She was then asked: "How much money did you leave at Zajlock's office the day you went over there?" This was

objected to and the objection erroneously sustained. She was then asked: "Did you leave all the money which you got from the bank at Zajicek's office?" The objection was likewise sustained.

Plaintiffs also introduced in evidence the cashier's check on the American State Bank, dated July 2, payable to plaintiffs' order for \$1525.29, which bore plaintiffs' endorsements. And there is other evidence in the record that plaintiffs drew this amount out of the bank on the date of the check which was all they had in that account; that they also had another account in the same bank and on the same day drew out something over \$324.00 in cash.

From the foregoing it appears that sometime prior to July, 1920, the defendant requested plaintiff to loan him money with which to pay off a mortgage on his house; that on July 2, 1920, plaintiffs withdrew from the bank \$1860.00 and that one of the plaintiffs went to the real estate man, Zajicek, who had the mortgage for collection and left him the money for that purpose. While the evidence in the record is not as full as it should be, this condition was brought about by the erroneous objections made by the defendant. Moreover, the evidence is clear that both plaintiffs, Zajicek and Kolin in the fall of 1923 called on the defendant at different times and demanded the payment of the money which plaintiffs had loaned the defendant with which to pay off the mortgage and that the defendant agreed to do so as soon as he sold his house. The defendant testified that there was a \$2,000.00 mortgage on his house, but that he paid it off

himself with his own money; that he had \$1,000.00 in his house and another \$1,000.00 he had loaned to Anthony Kucia; that Kucia repaid the \$1,000.00 and that defendant gave the \$2,000.00 to his wife and she paid off the mortgage. Kucia testified for the defendant that he had borrowed \$1,000.00 from the defendant about six months before July, 1920; that he repaid this about July 12, 1920 in two payments, both being paid by check, one \$900.00 and one for \$100.00. Neither of the cancelled checks were introduced in evidence. Under the circumstances as disclosed by the record, the court was right in leaving the question to the jury, and upon a careful consideration of all the evidence in the record, we are clearly of the opinion that the finding of the jury in plaintiffs' favor, cannot be said to be against the manifest weight of the evidence. In these circumstances, we are not at liberty to disturb the verdict and judgment.

The defendant further contends that there should have been a directed verdict on account of the misjoinder of parties plaintiffs; that the evidence shows that the money, if any was loaned, belonged to the plaintiff, Paul Bujak, and not to him and his wife, because the evidence shows that Paul Bujak earned all the money. There is no merit in this contention. The money in the bank was the joint account of plaintiffs. Moreover, if all the money had been earned by Paul Bujak as a result of his labor, his wife was taking care of the home and there is no reason why Paul Bujak could not give his wife an interest in the money. The defendant also contends that the court erred

himself with his own money and he had \$1,000.00 in his
 house and another \$1,000.00 he had loaned to Anthony Kumbas
 that Kumbas repaid the \$1,000.00 and that defendant gave
 the \$1,000.00 to his wife and she paid off the mortgage.
 Kumbas testified for the defendant that he had borrowed
 \$1,000.00 from the defendant about six months before July
 1937 and he repaid this about July 12, 1937 in two pay-
 ments, one being paid by check, one \$500.00 and one for
 \$500.00. Kumbas testified that he was not in the
 in witness, and the defendant is charged by the
 second, the court was right in leaving the question to
 the jury, and upon a careful consideration of all the
 evidence in the record, we are clearly of the opinion that
 the finding of the jury is plain and correct, cannot be
 held to be against the manifest weight of the evidence.
 In these circumstances, we are not at liberty to disturb

in giving the instruction offered by plaintiff. That instruction told the jury that if they found from a preponderance of the evidence that plaintiffs had loaned the defendant the several sums of money "as testified to by plaintiffs" and that the sum had not been repaid, then plaintiffs were entitled to recover. The complaint made to this instruction is that it told the jury what plaintiffs had testified to and that it gave undue prominence to their testimony. We think the instruction in no way prejudiced the defendant. While it might have been better not to have used the words quoted, yet the issues were simple and the jury were in no way misled. It is further contended that the judgment is excessive, apparently on the ground that the evidence showed that the defendant had paid in full for the board of himself and family. We think this question was a question for the jury. Moreover, if there was any error in this regard, plaintiffs remitted the \$278.75 and they only claimed \$140.00 for board. We have considered the other contentions made, but are of the opinion that they are not such as would warrant us in disturbing the judgment.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

in giving the instruction offered by plaintiff. That
defendant told the jury that all they found from a
search made of the evidence that plaintiff had loaned the
defendant the several sums of money "as testified to by
plaintiff" and that the sum had not been repaid, then
plaintiff was entitled to recover. The complaint ends
to the instruction is that if said the jury what
plaintiff had testified to and that is not what
plaintiff testified, it being the instruction in no way
withheld the defendant. While it might have been better
not to have used the words "as testified to by
plaintiff" and the jury was in no way misled. It is further
stated that the judgment is excessive, especially on
the ground that the evidence shows that the defendant
had paid in 1911 the full amount of \$100.00 and that
he think this question was a question for the jury. Now
more, it there was any error in this regard, plaintiff
waived the \$100.00 and they only claimed \$100.00 for
more. We have considered the other contentions made,
but one of the opinion that they are not such as would
warrant us in disturbing the judgment.

The judgment of the Circuit Court of Cook County
is affirmed.
JAMES W. HARRIS, J.
JAMES W. HARRIS, J.

141 - 30400

PEOPLE OF THE STATE OF ILLINOIS,
ex rel STANLEY BARSKI,

Appellee,

v.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

WILLIAM E. DEVER, MAYOR, AL. F.
GORMAN, City Clerk, THOMAS P.
KEANE, City collector and MORGAN
A. COLLINS, Superintendent of
Police of City of Chicago.

Appellants.

241 I.A. 608

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

On January 14, 1925, Stanley Barski filed his petition for a writ of mandamus, by which he sought to compel the city officials to issue to him a retail beverage dealer's license. The defendants filed an answer to the petition. A jury was waived and the cause heard before the court; evidence was offered on behalf of the petitioner and the defendants; the court found the issues for the petitioner and awarded the writ as prayed and the defendants appeal.

The record discloses that the relator was the owner of improved real estate known as No. 1458 West 47th street, Chicago, which was a three story brick building; that he together with his wife and two children lived in the rear of the premises on the first floor, the front part of such floor having theretofore been used as a soft drink parlor, the other floors of the building were occupied by four other families; that the petitioner was of foreign birth, had lived

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

808 ALIUS

Opinion of the Court
The majority of the Court

• 70 •

[illegible]

Working from the westward end of the main street, and lined
the outer limits of the building were located up the street
those having immediate access to a cold water supply.
The windows on the first floor, the front part of each
building, and the rear part of the building, and the
of the main street, were as follows: The main street,
The front of the building, and the rear of the building.

in Chicago about twelve years but had not secured his final naturalization papers. The evidence further shows that the relator had purchased the premises in question on or about July 5, 1923; that apparently prior to that time the former owner had conducted a soft drink parlor in the front of the first floor of the premises; that after the petitioner purchased the property he operated a soft drink parlor there until about two weeks prior to October 20, 1923, when he closed the place on account of lack of business; that when he conducted the business he sold near beer, root beer, cigars, soda and sandwiches; that he had never been in trouble before and had never been arrested, except on October 20, 1923, when three officers entered his place, searched the part of the first floor where he had conducted his business until about two weeks before that date, as well as the rooms in the rear, where he and his family lived; that the officers found nothing in the premises and then went to the garage in the rear where they took up some boards of the floor and found in a hole that was dug under the floor a five gallon jug of "moonshine whisky" or alcohol. This was taken by the officers and the relator placed under arrest. He was prosecuted for this in the Municipal Court and the evidence tends to show he was discharged.

The petitioner testified that when he began to conduct the business he retained in his employ a former bartender, who had been employed by the person who formerly conducted the business in the property, but that a short time before October 20, 1923, he discharged the bartender because of lack of work and afterwards the bartender sued

in Chicago about twelve years but had not counted his time
in Chicago about twelve years. The evidence further shows that the
relator had purchased the premises in question on or about
July 8, 1908; that approximately prior to that time the relator
owner had conducted a retail drug business in the front of 1204
West Erie at the premises; that after the relator had
leased the property he operated a retail drug business there until
about two weeks prior to October 30, 1908, when he closed
the place on account of lack of business; that when he con-
ducted the business he sold meat, poultry, eggs, etc.,
and also conducted a retail drug business; that he had never been in trouble be-
fore and had never been arrested, except on October 30, 1908,
when three officers entered his place, searched the premises
of the front there where he had conducted his business until
about two weeks before that date, as well as the rooms in the
back, when he and his family lived; that the officers found
nothing in the premises and then went to the garage in the
back where they took up some boxes at the rear and found
in a box that was kept under the floor a few papers and
"medicinal bottles" or similar. This was taken by the officers
and the relator placed under arrest. He was prosecuted for
this in the Municipal Court and the evidence tends to show he was
discharged.

The defendant testified that when he came to
conduct the business he conducted in the garage a few
premises, and had been supplied by the parties who had
conducted the business in the property, but that a short
time before October 30, 1908, he discontinued the business
because of lack of work and discontinued the business.

him for wages. A police officer testified on behalf of the defendants and his testimony is to the effect that he together with two brother officers were in the neighborhood of plaintiff's place of business on October 20th, about 12:40 o'clock P.M.; that they met the former bartender who told them that the relator had sold moonshine and that if the officers searched the premises they would find some of the liquor under the floor of the garage; that thereupon the officers went to the premises and saw the relator. They told him they wanted to search the first floor and the relator permitted them to do so without objections, and that they found nothing in the premises; that they then told the relator they wished to examine the garage and the relator went with them and opened the door so that they could do so; that they took up some boards in the floor of the garage and found the alcohol or moonshine whisky in a hole under the floor; and that they took the alcohol with the relator to the police station; that the relator admitted to the officers that the moonshine belonged to him. On the trial the relator denied that the liquor was his and denied having any knowledge as to how it came to be stored under the garage. It was admitted that the two other officers would give testimony substantially the same as that given by the officer who had been on the stand.

A brief and argument has been filed on behalf of the defendants, but none on behalf of the relator. The defendants contend that under the well established rule of pleading, the relator must allege facts and not conclusions, and that the petition consists mostly of conclusions as

[illegible]

distinguished from allegations of fact. The defendants further contend in this respect that the allegations with reference to the application made by the relator for a license are but conclusions and not allegations of fact. A further point made by the defendants is that under a fundamental rule of pleading where an affirmative defense is set up in an answer and not denied by replication, it is admitted, and that the defendants by their answer set up an affirmative defense to which no replication was filed and, therefore this affirmative defense was admitted. Most of the cases cited by counsel for the defendants in support of their contention that the allegations of the petition were insufficient and that they were conclusions and not statements of facts, arose where the petition had been demurred to. In the instant case, however, the question was not raised when the petition was answered and the case was tried on its merits. In these circumstances, we think the allegations of the petition were sufficient.

The defendants further contend that the record fails to show that the relator made a application for the license in question. We think this is not borne out by the record, but on the contrary, it affirmatively appears that the application for a license was exhibited on the trial and counsel for the defendants who examined it, stated that it was all right and in response to a question by the court said it was an application for a license for the year 1935. When the relator was on the stand his counsel apparently was seeking to prove that an application had been made for the license and the following occurred: "The

court: You can't prove it that way. Counsel for Relator: I will prove it another way. " * * Counsel for the defendants: Let me see it. (Looking at the application) May be I will agree to it. I want to find out. That is all right. I just want to find out if the application has been made. Counsel for the relator: Yes. The court: For a 1935 application. Counsel for the defendants: Sure."

Defendants make the further point, as above stated, that in their answer they set up an affirmative defense and since no replication was filed traversing that part of the answer, it stood admitted of record and counsel for the defendant points out that the answer contains the following allegation: "On divers occasions police officers of the City of Chicago found the petitioner conducting his business at the said premises under circumstances which led them to believe that he was selling intoxicating liquors in violation of the ordinances of the City of Chicago and the statutes of the State of Illinois in such cases made and provided, and that such facts having been presented to the Mayor, the petitioner's license was revoked in accordance with the provisions of the ordinance hereinbefore referred to, and that because of such facts the petitioner is not a fit and suitable person to have a license." No evidence was offered by the defendants to substantiate this allegation. Nor did the defendants on the trial call the attention of the court to the fact that no replication had been filed, but on the contrary, counsel for both sides led the court to belief that the issue had been properly joined. In these circumstances, the defendants will not now be heard to say that

the allegation stood admitted of record. Moreover, the testimony of the relator is to the effect that he never sold intoxicating liquors on the premises at any time, and there is no evidence to the contrary. Under the evidence in the record and considering the method under which it was tried and the argument made by counsel for the defendants in this court, we are clearly of the opinion that we would not be warranted in disturbing the judgment.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, J. CONCURS;

THOMSON, P.J. DISSENTING:

In my opinion the judgment appealed from should be reversed. Before a court may interfere with the exercise of the discretion of the administrative officials of the city, which is reposed in them under the law, the petitioner who brings a mandamus proceeding must show clearly that there has been an abuse or unreasonable or arbitrary exercise of that discretion. In my opinion a finding that such a showing was made in this case is against the manifest weight of the evidence.



the situation stood outside of court. However, the testimony of the witness is to the effect that he never said anything about leaving on the grounds of any time, and there is no evidence in the country. Under the evidence in the record and taking into the matter which it was tried and the judgment made by counsel for the defendant in this court, we are clearly of the opinion that we would not be warranted in disturbing the judgment. The judgment of the District Court of Cook County is affirmed.

WITNESSES

ALFRED J. WILSON

WILLIAM F. L. ALLEN

It is ordered that judgment be entered for the plaintiff. In testimony whereof, I have hereunto set my hand and the seal of the court at Chicago, Illinois, this 10th day of June, 1907. The testimony of the witness is to the effect that he never said anything about leaving on the grounds of any time, and there is no evidence in the country. Under the evidence in the record and taking into the matter which it was tried and the judgment made by counsel for the defendant in this court, we are clearly of the opinion that we would not be warranted in disturbing the judgment. The judgment of the District Court of Cook County is affirmed.

162 - 30431

GREGORY T. VAN NETER, Administrator
of the Estate of Hans Nielsen, Deceased,

Appellee,

v.

S. H. SERWATT, ET AL,
On appeal of FLAG PETERSON,

Appellant,

APPEAL FROM

CIRCUIT COURT.

241 I.A. 608

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action under the statute
against Flag Peterson and S. H. Serwatt, to recover on
account of the wrongful death of Hans Nielsen, deceased.
Plaintiff dismissed his suit as to Serwatt, there was a
verdict and judgment in favor of the plaintiff, for
\$4,000.00 and Peterson appeals.

The record discloses that about one o'clock on
the morning of May 14, 1922, defendant was driving his
five passenger Wickenbacker automobile in a northwesterly
direction on Milwaukee avenue in the town of Miles Center,
which is located about ten miles northwest of Chicago and
at the same time the deceased, Hans Nielsen, was driving
a seven passenger Mitchell automobile in a southeasterly
direction on the same street; that the two automobiles
collided and as a result, Nielsen was so severely injured
that he died within a few hours thereafter. It is to recover
the damages sustained by his heirs that this suit is brought.

EDWARD J. VAN NEST, Administrator
of the Estate of HARRY NICHOLSON, Deceased.

UNITED STATES

DISTRICT COURT

100 A. I. A. 608

Opinion filed March 10, 1936.

THE COURT OF COMMONS delivered the opinion of

the court.

Plaintiff brought an action under the statute
against King Peterson and A. H. Bennett, to recover an
amount of the wrongful death of Harry Nicholson, deceased.
Plaintiff claimed his wife as to Bennett, there was a
verdict and judgment in favor of the plaintiff, for
\$1,000.00 and interest thereon.

The record discloses that about one o'clock on
the morning of May 14, 1932, defendant was driving his
five passenger automobile westward on a residential
street in the city of Seattle. In the line of travel
there is located about one mile westward of the intersection
at the same time the deceased, Harry Nicholson, was driving
a seven passenger Mitchell automobile in a southeasterly
direction on the same street; that the two automobiles
collided and as a result, Nicholson was so severely injured
that he died within a few hours thereafter. It is so reported
by the autopsy conducted by the police that this was the case.

The declaration was in four counts and we take from the abstract, where the declaration is very meagerly abstracted, the substance of the allegation of each count. The first count charges the defendant with general negligence in the operation of his automobile. The second charges him with negligence in operating his automobile at a high and dangerous rate of speed. The third count charges the defendant with "willful, wanton and malicious conduct in the operation of the automobile. And the fourth count charges the defendant with a violation of the provisions of section 16 of the Motor Vehicle Act of 1919, which provides that "On approaching another vehicle proceeding in an opposite direction, and when within not less than 350 feet of the same, any person in charge of a motor-bicycle or motor vehicle equipped with electric headlight or headlights, shall dim or extinguish such headlight or headlights", and avers that the defendant in violation of that statute operated his automobile with glaring and dazzling lights and failed to dim or extinguish them when within 350 feet of Nielsen's automobile, and that through such negligence, the collision occurred and Nielsen was killed. (This section was amended in 1931 which was prior to the occurrence in question.) The defendant filed a plea of the general issue and a special plea alleging nonownership and operation of the car. The case went to trial and, at the close of plaintiff's case, the court directed a verdict for the defendant. Afterwards a new trial was granted and, at the close of the second trial, plaintiff dismissed as to the defendant Serwatt, and there was a verdict and judgment

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It is further assumed that the following conditions hold:

and related taxonomic studies are continuing.

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as for a ball suspended at a distance of 100 feet from the

in plaintiff's favor and against the defendant, Peterson, for \$4,000.00.

Since we have decided that there must be a new trial, we refrain from discussing the evidence in the case, except in so far as it may be necessary for us to do so in giving the reasons for our decision. Evidence was offered on behalf of the plaintiff tending to show that at the time in question, viz. about one o'clock on the morning of May 14, 1922, Nielsen with two other men was driving on Milwaukee avenue in the Village of Niles Center, in a southeasterly direction toward Chicago, the speed of the automobile being about 25 miles per hour. Peterson was driving his automobile in the opposite direction and the two machines collided, the left front wheels coming in contact; that the defendant's automobile swung around toward the north-west and turned completely around so that when it came to rest, it was standing in the ditch at the westerly side of the pavement, facing toward Chicago. Nielsen's automobile when it came to rest, was facing in an easterly direction on the east side of the roadway and was turned over on its side; that Nielsen was severely injured and died a few hours thereafter. Plaintiff's evidence further tended to show that when the two automobiles were, what would be the equivalent of about two city blocks apart, the young men who were riding with Nielsen saw the defendant's approaching automobile and that it had two glaring headlights, as well as a spotlight, which tended to blind them, and that neither the headlights nor the spotlights were dimmed at any time.

On behalf of the defendant evidence was introduced

in plaintiff's favor and against the defendant, Peterson,
for \$4,000.00.

Since we have decided that there must be a new
trial, we refrain from discussing the evidence in the case,
except in so far as it may be necessary for us to do so in
giving the reasons for our decision. Evidence was offered
on behalf of the plaintiff tending to show that at the time
in question, viz. about one o'clock on the morning of May 14,
1934, Kliesen with two other men was driving on Highway
number 14 in the Village of Miles County in a southeasterly
direction toward Chicago, the speed of the automobile
being about 35 miles per hour. Peterson was driving his
automobile in the opposite direction and the two automobiles
collided, the left front wheel coming in contact; that
the defendant's automobile swung around toward the north-
west and turned completely around so that when it came to
rest, it was standing in the ditch at the westerly side of
the highway, facing toward Chicago. Kliesen's automobile
when it came to rest, was facing in its westerly direction
so the west side of the highway and was located very close
to the ditch; that Kliesen was seriously injured and that a few
hours thereafter, Kliesen's relatives, friends, family and
others came from the two automobiles and that would be the
evidence of about two days after the accident, the road was
not very rough and clear and the defendant's automobile
automobile and that it had not been damaged, or will
be a specimen, which would be like that, and that neither
the plaintiffs nor the defendant were injured at the time.

tending to show that the defendant Peterson had "dimmers" on his two headlights, so that it was impossible for them to cast a glaring light, and that the spotlight was pointed downward and to the right hand side of Peterson's car, to enable him to see that side of the pavement. The defendant's evidence further tends to show that Peterson's car was traveling at from eighteen to twenty miles per hour, and that the collision occurred some few inches east of the center line of the roadway; that the defendant's car was traveling all the time on the proper side of the center of the pavement; that Nielsen's car at and prior to the collision was being driven at from 35 to 40 miles per hour. The defendant called a surveyor who testified that on May 24, 1922, he had made a survey of that part of the road where the collision took place and a plat which he had made, was offered in evidence which tended to show that the collision took place on Peterson's side of the roadway. It also appears from the record that when the surveyor was identifying the plat, that this same plat had been exhibited to counsel for the plaintiff on the first trial of the case and then it was admitted without objection. On cross-examination of this witness by counsel for plaintiff, after being asked as to his residence, the following took place: "Q. At whose request did you make this plat. A. At the request of an insurance company, I do not recall the name of the Insurance Company. (Counsel for defendant). If the court please, we move that be stricken out. (Counsel for plaintiff) It may go out. (Counsel for defendant) Counsel knew what that answer would provoke; no question about that. The Court: Motion denied." Counsel for defendant, excepted and moved to withdraw a juror

...to show that the defendant was not negligent on his
two hands, so that it was impossible for him to avoid a
glaring light, and that the spotlight was pointed downward and
on the right hand side of Peterson's car, so as to make him see
the right side of the defendant. The defendant's evidence
tends to show that Peterson's car was traveling
at from fifteen to twenty miles per hour, and that the
collision occurred some few inches east of the center line of
the roadway; that the defendant was traveling all
the time on the proper side of the center of the roadway;
that Peterson's car at the time of the collision was being
driven at from 25 to 40 miles per hour. The defendant
witnesses, however, who testified that on May 24, 1932, he
had made a survey of that part of the road where the col-
lision took place and a plan which he had made, was offered
in evidence which tended to show that the collision took
place on Peterson's side of the roadway. It also appears
from the record that when the accident was happening
the light was such that it was impossible to see
for the distance of the road until it was too late to
be avoided without accident. The court admitted of this
evidence by counsel for plaintiff, after being asked as to his
admission, the following took place: "Q. At whose re-
quest did you make this plan? A. At the request of the
attorney, I made this plan for the use of the plaintiff's
counsel. The defendant, if the court please, we have no
objection to it. (Exhibit for plaintiff) It may be used,
(Exhibit for defendant) Counsel now says that this accident would
have occurred if the defendant had been on the right hand side of the
roadway; the defendant's evidence, however, tends to show that the
defendant was not negligent and would be entitled to a verdict

and to declare a mistrial, which motion was denied.

It has been repeatedly held that it is error in a case, such as the one at bar, to intimate or bring to the jury's attention the fact that the defendant is insured and that he will not be required to pay any judgment that might be rendered against him, but that a casualty company is the party interested in the defense of the suit. Monblatt v. Young, 189 Ill. App. 312; Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586. Such error, however, will not always warrant a reversal of the judgment where the question of liability is not a close one or where the court can see upon an examination of the entire record that the defendant had not been seriously prejudiced. But in the instant case, upon a careful consideration of all the evidence in the record, we think the liability of the defendant is a question of grave doubt, and therefore, the jury should not have any intimation that a casualty company is interested in the defense of the suit. And what took place was especially prejudicial when it is considered that the court denied plaintiff's motion to strike out the objectionable answer.

Since there must be a new trial of the case, it is necessary to pass on other contentions made by the defendant. The second count of the declaration, charging that the defendant operated his automobile at a high and dangerous rate of speed was withdrawn by plaintiff on the trial. The defendant contends that there was no evidence to sustain the allegation of the third count, which charged willful and wanton negligence, and therefore, the only count remaining was

and to declare a mistrial, which action was denied.

It has been repeatedly held that it is error

in a case, such as the one at bar, to inquire on voir

to the jury's attention the fact that the defendant is

innocent and that he will not be required to pay any judg-

ment that might be rendered against him, and that a

causally necessary to the party interested in the defense of

the case. People v. Jones, 102 Ill. App. 311, 312, 313, 314, 315.

People v. Jones, 102 Ill. App. 311, 312, 313, 314, 315.

will not always warrant a reversal of the judgment where the

question of liability is not a close one or where the court

has not been an examination of the entire record, but the

defendant has not been unfairly prejudiced. But in the

instant case, upon a careful examination of all the

evidence in the record, we think the liability of the de-

fendant is a question of grave doubt, and therefore, the

jury should not have any intimation that a causally necessary

is involved in the defense of the case. And what took

place was especially prejudicial when it is considered that

the court denied plaintiff's motion to set aside the ver-

dict of the jury.

When there must be a new trial of the case, it is

necessary to give an other consideration made by the defendant.

The court's error at the hearing, making this the

first time the defendant was made a party to the hearing.

There is no doubt the defendant's liability on the trial, the

defendant contends that there was no evidence to sustain the

allegation of the third count, which charges willful and

malicious neglect, and therefore, the only count remaining was

the fourth count, which charged the defendant with operating his automobile with glaring and dazzling headlights and his failure to dim or extinguish them as the statute required, and as to this count the defendant contends that even if it be assumed that the allegations were sustained by the evidence, it would clearly show that Nielsen was guilty of contributory negligence in driving his car toward the glaring headlights of the defendant's automobile and a number of authorities are cited in support of this contention. We will not stop to analyze the authorities cited, but we are of the opinion that if the jury believed from the evidence that the defendant had glaring and dazzling headlights on his automobile, contrary to the provisions of the statute, and that such lights were the proximate cause of the collision, the question whether the deceased, in driving his car toward these glaring headlights was guilty of negligence, was a question of fact for the jury. We are also of the opinion that the defendant's position is correct, when he argues that there was no evidence of any willful or wanton negligence as charged in the third count of the declaration. It has been held, however, that if a count of a declaration properly charges ordinary negligence and in addition charges the defendant with being willfully and wantonly negligent, it will sustain a verdict where the evidence shows only ordinary negligence. Guianios v. Redmap Coal Co., 242 Ill. 378. We do not want to be understood, however, as passing upon the sufficiency of any count of the declaration, as that question has not been raised by either party. We think

the fourth count, which charged the defendant with operating
his automobile with glaring and dazzling headlights
and his failure to dim or extinguish them as the witness
testified, and as to this count the defendant contended
that even if it be assumed that the allegations were
established by the evidence, it would clearly show that
Nicholson was guilty of contributory negligence in driv-
ing his car toward the glaring headlights of the de-
fendant's automobile and a failure to exercise due
care in respect of this contention. We will not stop
to analyze the hypothesis stated, but we are of the
opinion that if the jury had seen the evidence that
the defendant had glaring and dazzling headlights on
his automobile, contrary to the provisions of the statute,
and that such lights were the proximate cause of the
accident, the question whether the defendant was guilty of
his own negligence in driving his headlights was guilty of
negligence, was a question of fact for the jury. We are
not of the opinion that the defendant's negligence is
excused, and we agree that it is not excused by the
fact that the defendant's negligence is charged in the fourth
count of the indictment. It has been held, however,
that if a count of negligence properly charges contrib-
utory negligence and is established against the defendant with
proof sufficiently and correctly made, it will maintain
a verdict where the defendant would not otherwise be
liable. Nicholson v. Jones, 111 Ill. 271, 272.
It was held in the case cited, however, as bearing upon
the sufficiency of any count of the indictment, as that
negligence was not been shown by other counts. We think

that we ought to also say that if there is liability in this case a verdict of \$4,000.00 would not be excessive. Poach v. Chicago Railways Co., 221 Ill. App. 241. Complaint is also made by the defendant as to certain instructions given. We are unable to pass upon the contention made, because it is impossible to determine from the record at whose request any of the instructions were given, and the only thing we can do is to surmise, upon a reading of them, as to whether the plaintiff or the defendant submitted the instruction. We think we ought to say, however, that the instruction given, which quoted the statute about headlights, ought not to be given on a new trial of the case without applying the statute to the case by adding a qualification to the effect that no recovery could be had, unless the jury believe from the evidence that the defendant at the time in question was operating his automobile in violation of the statute and that such violation was the proximate cause of the collision. We do not want to be understood as intimating our opinion on any of the other instructions.

For the reason given, the judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

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STAND-UP IN CHAIRS AND JUDGES' SEAT; THE
JUDGES' SEAT WAS LIFTED UP BY A JACK AND TO BE

1. *Chlorophyll a* (Chl a) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl a is essential for the light-dependent reactions of photosynthesis, where it converts light energy into chemical energy in the form of ATP and NADPH.

184 - 30445

LOUIS ROGOWSKI and HENRIETTA
ROGOWSKI,

Appellants,

v.

CHARLES S. WOLLAK,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 608

Opinion filed March 10, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

One June 12, 1923, plaintiffs brought an action
of trespass on the case against the defendant, claiming
damages in the sum of \$2,000.00, and on September 7, 1923,
filed their declaration, which was in three counts, to
which defendant filed a plea of the general issue. After-
wards on June 8, 1925, plaintiffs, by leave of court,
filed two additional counts and to these counts, the
defendant filed a plea of the general issue. The case
was tried before a judge and a jury, there was a verdict
and judgment in defendant's favor and plaintiffs appeal.

Each of the five counts are substantially the
same. They allege that on or about the 29th of August,
1921, one Stanley W. Kosa, and the defendant, for the pur-
poses and with the intent of thereby procuring plaintiffs
money, represented that there was existing under and by
virtue of the laws of this state, a corporation by the
name of "Union Commercial Corporation"; that such corpora-
tion owned real and personal property of the value of
\$100,000.00, over and above its indebtedness; that the

UNITED STATES DISTRICT COURT
SOUTHERD DISTRICT

IN RE

v.

MAURICE A. BROWN

Defendant

MAURICE A. BROWN

Defendant

DOCK COUNTY

241 I.A. 608

Opinion filed March 10, 1938.

THE COURT OF APPEALS delivered the opinion

of the court.

On June 12, 1937, Maurice A. Brown was indicted

at St. Louis on the charge of receiving stolen property in the sum of \$5,000.00, and on September 7, 1937,

filed their indictment, which was in three counts, to

which defendant filed a plea of the general issue. After

verdict on June 8, 1938, plaintiff, by leave of court,

filed his motion for judgment of acquittal, and on June 10, 1938,

defendant filed a plea of the general issue. The court

was asked before a jury and a verdict was returned

and judgment is rendered in favor of plaintiff's motion.

None of the facts are material to the

case. The only fact is that on June 12, 1937, defendant

was indicted on the charge of receiving stolen property in the sum of \$5,000.00, and on September 7, 1937,

filed their indictment, which was in three counts, to

which defendant filed a plea of the general issue. After

verdict on June 8, 1938, plaintiff, by leave of court,

filed his motion for judgment of acquittal, and on June 10, 1938,

defendant filed a plea of the general issue. The court

was asked before a jury and a verdict was returned

corporation was conducting an extensive and profitable business, but that it needed more ready cash to carry on its business; that Kosa was the president and the defendant Wollak, the secretary of the corporation, and that they represented that they were legally authorized to borrow, on behalf of the corporation, and to undertake on behalf of the corporation to repay any money borrowed with 10 percent interest; that plaintiffs on the faith of such representations and statements and relying implicitly upon them and believing them to be true, gave \$2,000.00 to Kosa for a loan to the corporation and thereupon Kosa and the defendant Wollak, then and there made out and signed on behalf of the corporation, a promissory note payable to plaintiffs for \$2,000.00 with interest thereon at 10 percent and signed the same as president and secretary, respectively, of such corporation. It is further averred that the representations made by Kosa and the defendant, Wollak, were utterly false and untrue; that there was no such corporation as the Union Commercial Corporation and that the money had not been paid to plaintiffs.

Plaintiffs offered evidence tending to show that in 1920, Kosa and his wife, together with one Dean, were carrying on a mercantile business at Nos. 1548-50 Milwaukee avenue, Chicago, and that they maintained an office at No. 1388 Milwaukee avenue from which to solicit subscriptions to stock in such business; that Kosa and his wife were aliens and on January 16, 1920, they, together with Dean, filed the ordinary papers with the

Secretary of State for the purpose of organizing the Union Commercial Corporation with an authorized capital stock of \$100,000.00 which document indicated that \$57,200.00 of this amount was paid in by the transfer of the business on Milwaukee avenue; that the three persons were named directors,- Kosa was President, Bean, Vice President and Mrs. Kosa, Secretary and Treasurer; that a few months thereafter, Bean severed his connections because he thought the business was not being conducted honestly. The evidence further shows that the defendant Wollak, was a young man about twenty years of age, living with his parents in Chicago and was working for the Crane Company; that he saw an advertisement in a Polish paper, inserted by Kosa for the Union Commercial Corporation which stated they wanted to employ some young men as clerks to work up into executive positions. Wollak testified that he thought he had a little time in the evenings and wanted to make a little money, so he went over and talked to President Kosa; that Kosa asked him what he could do and he replied that he could do a little typewriting and general office work; that Kosa then gave him some typewriting to do as a test and told him that he would let him know later whether he would be employed, but before Wollak left, Kosa told him that if he were employed he would have to buy some stock in the corporation; that all employees were required to own stock in the company; that Wollak told him that he had no money, but was buying a \$50.00 liberty Bond at the Crane Company where he was employed; that in a short time he would be able to pay for the bond and bring it in; that Kosa said he would rather have the

money, but if the bond was brought in he would allow Wollak the market value of it. Wollak further testified that he asked Kosa what salary he might expect, to which Kosa replied he could not give him any money; that shortly afterwards Wollak returned and brought the bond and was allowed the sum of \$45.00 for it and was given a certificate apparently showing some interest in the corporation, the certificate being for five shares of stock at \$10.00 per share; that Wollak was to get the stock certificate when he paid for it by his work in addition to giving the bond; that a few days after his first interview, Wollak returned and was put to work and Kosa agreed to pay him \$6.00 per week for work to be done in the evening between 8:30 and 9:30 o'clock; that sometime later his wages were raised to \$7.00 per week and later he was receiving \$10.00 per week; that he continued to work for the concern for about 1½ years and until the summer of the year 1921; that in August of that year he first saw plaintiffs at their home, having gone there with Kosa and one of plaintiff's neighbors; that an attorney was also present; that they were at plaintiffs' home about fifteen minutes; that the neighbor introduced Kosa as president and the defendant as secretary of the corporation to plaintiffs; that defendant paid little attention to this; that Kosa had a conversation with the plaintiff Lewis Rogowski and that the witness was sitting talking to some lady; that Kosa spoke to the plaintiff about borrowing some money; that the parties then left plaintiffs' home and a few days after the defendant signed the note as secretary at the Milwaukee avenue place

money, and if the bank was wrong in its refusal to
release the money on 15. William French testified
that he asked him what he might expect, to which
Kane replied he would not give him any money, that money
of French's money returned and brought the bank and was
allowed the sum of \$10.00 for it and was given a certificate
and apparently showing some interest in the corporation,
the certificate being for five shares of stock at \$20.00
per share; that French was to get the stock certificate
when he paid for it by his work in addition to giving
the money; that a few days after his first interview
French returned and was told he was not allowed to
pay him \$10.00 but that he was to be paid in the future
between \$10.00 and \$15.00 weekly; that French told him
when they returned to \$10.00 but that he told he was making
up his mind to pay; that he was making up his mind to pay
for money if there was still the money of the bank;
that in regard to that fact he told the certificate of stock
first, he told him that when he was at French's
apartment; that on Saturday he also learned that they
were at French's apartment; that French learned that the
other witnesses were at French's apartment and the witnesses
on Saturday of the apartment in French's apartment; that French
and French's apartment he told that French had a certificate
that the French's apartment was not the witness
was giving him in some form; that French was to be
French's money returned when money; that French
told him after a few days after the witnesses
learned the money on Saturday at the apartment where French

of business, at the request of Kosa, after Kosa had told him that plaintiffs had given him the money. The witness further denied that he had exhibited pictures at the Milwaukee avenue office to plaintiffs, tending to show that the corporation owned a great deal of property. He also denied taking any part in the conversation between Kosa and plaintiffs in reference to the borrowing of the \$2,000.00 in question.

The plaintiffs further offered evidence to the effect that after talking with their neighbor, Glewa, who told them that the corporation was borrowing money and paying 10 percent for it they went to the Milwaukee avenue place of business and discussed the matter with Kosa and the defendant, Woolak; and that at that time Kosa and the defendant exhibited to them pictures showing real estate which they stated belonged to the corporation, and further informed them that the corporation was conducting a very profitable business and was worth a great deal of money over and above its indebtedness. Plaintiffs offered other evidence tending to show that on July 18, 1921, the Attorney General of Illinois filed an information in the nature of a Quo Warranto against Kosa, his wife and one Skierski, in which it was alleged that these parties "purported to act as a corporation, known as the 'Union Commercial Corporation'"; summons was served in that case on the defendant July 19, 1921, and five days later, July 26, 1921, at seven o'clock in the evening in a ward in the County Hospital in Chicago, a meeting of the board of directors was held of the Union Commercial Corporation.

The directors at that meeting were Kosa and Skierski and at that meeting the resignation of Mrs. Kosa, as directors secretary and treasurer of the corporation, was accepted and immediately thereafter Charles S. Wollak was elected director, secretary and treasurer in her place (under what authority the directors could elect Wollak a director is not shown, was under the law directors are elected by the stockholders). Whether the defendant was present at this time is not clear, but he afterwards signed the minutes of the meeting, as its secretary. It will be observed that this meeting was held four days after Kosa, his wife and Skierski were served with summons in the Quo Warranto proceedings and there is no evidence that Wollak knew anything about this. On the trial it was stipulated that Stanley Kosa died November 27, 1923.

On November 3, 1921, a petition in bankruptcy was filed in the United States District Court in Chicago against "Stanley W. Kosa and May W. Kosa, co-partners, doing business as Union Commercial Corporation" and the petition prayed inter alia for the appointment of a receiver. On December 2, 1921, judgment was entered in the Quo Warranto proceedings to the effect that there was never any such corporation as the Union Commercial Corporation, for the reason that two of the three persons who filed the papers with the Secretary of State were aliens and under the law a corporation could not be formed except by three or more citizens of the United States. Six days later, on December 8th, Kosa and his wife were adjudged bankrupt in the Federal Court. The evidence further shows that plaintiffs filed their claim for the \$2,000.00 in

the bankruptcy proceedings and that later were paid a dividend of $6\frac{1}{2}$ percent. This was the first and final dividend. Plaintiffs offered certified copies of certain of the proceedings filed in the bankruptcy proceedings, but upon objection they were excluded.

Plaintiffs contend that the judgment is wrong and should be reversed because they were entitled to sustain their case under the common law as an action for fraud and deceit, and that they were also entitled to a judgment by virtue of the provisions of section 149 of the Corporation Act, which section provides that "if any person or persons being, or pretending to be an officer or agent or board of directors of any corporation, or pretended corporation shall assume to exercise corporate powers or use the name of such corporation or pretended corporation before it has been authorized to do business, under the laws of this state, then they shall be jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation or pretended corporation, and suits at law shall be prosecuted therefor by creditors individually."

The theory of plaintiffs' case, as alleged in their declaration, is that they had been defrauded out of their money through the fraudulent representations of Rosa and the defendant Wollak, which representations they relied upon; that the fraudulent representations were that they were officers of the Union Commercial Corporation, possessing large assets consisting of both personal and real property.

The foregoing provisions of the Act were said to be in violation of the Fifth Amendment. It was also said that the Fifth Amendment was not applicable to the Government in its capacity as a sovereign, but upon objection they were excluded.

The Court then considered the Fifth Amendment in regard to the Government's power to compel the production of documents. It was held that the Government has the right to compel the production of documents in its capacity as a sovereign, but that the Fifth Amendment applies to the Government in its capacity as a citizen. The Court then considered the Fifth Amendment in regard to the Government's power to compel the production of documents. It was held that the Government has the right to compel the production of documents in its capacity as a sovereign, but that the Fifth Amendment applies to the Government in its capacity as a citizen. The Court then considered the Fifth Amendment in regard to the Government's power to compel the production of documents. It was held that the Government has the right to compel the production of documents in its capacity as a sovereign, but that the Fifth Amendment applies to the Government in its capacity as a citizen.

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Plaintiffs' evidence we think clearly showed that such representations were entirely without foundation; that the corporation was not legally organized and that it had assets of little value; that such real estate which was represented to plaintiffs as belonging to the corporation did not belong to it or to Kosa or his wife. But we are also of the opinion that it is equally clear, at least the jury were warranted in finding as they did, that Charles S. Wollak, the defendant, did nothing of any consequence to induce plaintiffs to part with their money. The evidence shows that he was a young man without experience, had no property, was going to school and endeavoring to make a few dollars in the evening, and that he was employed by Kosa, but before being so employed he told him he would have to subscribe for stock in the corporation. It is clear that Wollak was entirely dominated by Kosa and had little or nothing to do with the matter. We are of the opinion that, not only did the evidence warrant the finding of the jury that Wollak did not help to induce plaintiffs to part with their money, but that he was also swindled by plaintiffs out of a \$50.00 Liberty Bond and the work which he did. We think no verdict could stand, based upon the allegations of the declaration, except one in favor of the defendant.

But plaintiff complains that the court erred in refusing to permit them to introduce any evidence of certain proceedings and documents in the bankruptcy matter. If there was error in this ruling, plaintiffs were in no way injured, because they proved the matter by the testimony

...the corporation was not legally organized and that it had
...of little value; that such real estate which was
...as a liability on belonging to the corporation
...did not belong to it or to him or his wife, but was his
...also of the opinion that it is equally clear, at least
...the jury were warranted in finding as they did, that
...Marion T. Mahan, the defendant, did nothing of any
...to induce Mahan to part with their money.
The witness shows that he was a young man without experi-
...had no property, was going to school and endeavoring
to make a few dollars in the evening, and that he was em-
ployed by him, but before being so employed he told him
he would have no objection for stock in the corporation,
it is clear that Mahan was entirely dominated by him
and had little or nothing to do with the matter, so that
of the opinion that, not only did the witness testify
the finding of the jury that Mahan did not help to induce
Mahan to part with their money, but that he was also
induced by Mahan to out of a \$500.00 Liberty bond and
the vote which he did, we think no verdict could stand,
based upon the all evidence of the testimony, except one
is that of the defendant.

...Mahan's complaint that the other stock in
...to be interested in the corporation of his
...and Mahan to the testimony of the witness
it that the same is still valid, Mahan's words to be
...Mahan's words to be valid, Mahan's words to be valid

of the plaintiffs themselves and other witnesses. Further complaint is made to the giving and refusal of instructions, but what we have said renders it unnecessary to discuss them here, since we are clearly of the opinion that no recovery could be had under the declaration and on the evidence in this case against the defendant.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

48 - 30294

CHICAGO TITLE & TRUST CO.,
Receiver of International
State Bank,

Defendant in Error,

v.

W. E. DICKINSON,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 608

Opinion filed Mar.10, 1926.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On April 23, 1923, the plaintiff, Chicago Title & Trust Company, Receiver of International State Bank, filed a statement of claim and cognovit on a judgment note in the Municipal Court, and obtained judgment against the defendant, W. E. Dickinson, in the sum of \$14,634.17. On May 3, 1923, the defendant made a motion, supported by affidavit, asking that the judgment by confession be vacated and set aside, and that he be given leave to make a defense. In the affidavit in support of that motion, the defendant claimed that the promissory note on which judgment was entered was executed by him without any consideration, and solely as a matter of accommodation to the International State Bank; that it was signed by him and delivered to the President of the International State Bank for the purpose of being negotiated for the benefit of that Bank; that it was not sold or negotiated, and "did not in any form become a liability of this defendant until the failure of said

International State Bank, nor to the present time;" that it never became the property of the Bank except as accommodation paper, executed by him, the defendant, for the accommodation of the International State Bank.

On the same day, an order was entered that the judgment be opened and leave be given to the defendant to appear and make a defense; that a trial of the cause be had notwithstanding the judgment; that the judgment stand as security, and that the affidavit filed with the action stand as an affidavit of merits for the defendant.

There was a trial before the court, without a jury, and on May 10, 1924, the court found that on the date of the entry of the judgment, there was due from the defendant to the plaintiff the sum of \$14,634.17. Judgment was entered on that finding, and that the judgment formerly entered against the defendant by confession stand confirmed as the judgment of the court. This appeal is from that judgment.

At the trial, there was first offered in evidence on behalf of the plaintiff the note in question. It is a note in the sum of \$13,000, dated November 15, 1922, payable ninety days after date to the order of the International State Bank, with interest at 6% after date, until paid, signed by the defendant W. F. Dickinson and endorsed, "International State Bank, E. Braslawsky."

The evidence as to whether the note was given for the accommodation of the International State Bank

Testimony of John Doe, son of the deceased, that
it never became the property of the bank except as a
collateral paper, executed by him, the defendant, for the
redemption of the industrial loan bond.

On the same day, an order was entered that the
judgment be affirmed and leave be given to the plaintiff to
show that it was a defense; that a trial of the issue be had
substantiating the judgment, that the judgment stand as
such, and that the plaintiff file with the clerk
within an additional period of time for the defense.

There was a trial before the court, with
a jury, and on May 10, 1900, the court found that on the
date of the entry of the judgment, there was due from the
defendant to the plaintiff the sum of \$10,000.00. Judgment
was entered on that finding, and that the judgment be affirmed
and the defendant be ordered to pay within a certain period
of time the sum of the judgment. This order is now in
force.

At the trial, there was a trial entered in evidence
a bill of the plaintiff the sum in question. It is a
bill for the sum of \$10,000, dated November 10, 1900, payable
to the order of the plaintiff, and the industrial loan
bond, which is attached to the bill, and which is
also in the possession of the plaintiff.

The evidence as to the facts of the case is as follows:
The industrial loan bond is a negotiable instrument.

(hereinafter called the Bank), and without consideration, consists chiefly of the testimony of the defendant himself, and Braslawsky, the President of the Bank, who testified for the plaintiff.

On direct examination Dickinson testified that in 1922 he was a bond broker; that negotiations for making the note in question took place between him and Braslawsky, President of the Bank; that Braslawsky told him that a few days prior to November 15, 1922, the Bank was indebted to the Continental and Commercial Bank to the amount of \$13,000 or \$14,000; that the Continental and Commercial Bank wrote him that if he would bring, his Dickinson's note, the Continental and Commercial Bank would discount it, that that would wipe out the Bank's indebtedness to the Continental and Commercial Bank; that he, the witness, accordingly, made out the note and, being a director of the Bank, gave the note to keep the Bank from becoming bankrupt; that at that time he owned ten shares of the Bank's stock; that Braslawsky told him that the Bank was pressed for money and would take care of the note; that Braslawsky said, "he would take care of the paper, I need not bother about it;" that he, the witness, received nothing and was promised nothing for the note. Following the defendant as a witness, one Russow was called for the defendant, and testified that he was an Assistant Cashier of the Bank prior to its failure; that he was not present at the time the note in question was executed, and did not know if anything was passed to the credit of or paid to the defend-

(hereinafter called "the Book"), and all other communications,
submitted orally or by letter to the Secretary of the National
Council, the President of the Board, the Executive Committee,

[illegible]

ant at the time the note was executed, that he did not know of any of the assets or property of the Bank being paid to the defendant for the consideration of the note; that the plaintiff made a demand upon the defendant for payment of the note on February 14, 1923. At the close of their testimony, the defendant rested.

The plaintiff then in support of the judgment introduced the testimony of Braslawsky, the President of the Bank. His testimony, in substance, is as follows: He first became acquainted with the defendant in May, 1922, when he had some negotiations with him concerning some bonds. The defendant told him that he was the agent for the College Coal & Mining Company (hereinafter called the Coal Company), to sell \$250,000 First Mortgage Bonds of the Coal Company; and if the Bank would undertake to sell and become his partner in the sale of those bonds, the Coal Company was willing to pay a 20% commission, that is, \$50,000 commission on the \$250,000 bond issue. He told the defendant that the Bank had never done anything in regard to selling bonds; that he was not interested in the offer. The defendant came back the next day and said that he had had thirty years experience as a bond broker, and all he desired was to use the name of the Bank in order to sell the bonds; that it was very hard to sell bonds as an individual. He, the witness, advised the defendant to consult with Mr. Noonan, a lawyer and, also, a director of the Bank, and if Noonan found the bonds to be good, he, the witness, would have no objection. Towards the end of May, 1922, a written contract was entered into between the Coal Company

and at the time the note was executed, that he did not know of any of the assets or property of the bank being sold to the defendant for the satisfaction of the note; that the plaintiff made a demand upon the defendant for payment of the note on February 14, 1933. At the time of their testimony, the defendant denied.

The plaintiff then in response to the defendant's testimony at Birmingham, the President of the Bank, the testimony in response is as follows: He first was acquainted with the defendant in May, 1932, when he had some negotiations with him concerning some bonds. The defendant told him that he was the agent for the College Trust & Savings Company (Birmingham office) to sell \$250,000 of bonds.

of the College Trust & Savings Company; and if the Bank would subscribe to sell and become its partner in the sale of those bonds, the Bank would be willing to pay a 10% commission, that is, \$25,000.

The defendant said that the next day and said that he had had thirty years experience as a bond broker, and all he needed was to get the name of the Bank in order to sell.

He would not be very hard to sell bonds on an individual, but the witness, advised the defendant to consult with Mr. Brown, a lawyer and, also, a director of the Bank, and if Brown found the bonds to be good, he, the witness, would also in connection. Towards the end of May, 1933, a witness

and the Bank, whereby the Bank undertook to sell the \$250,000 of the Coal Company's bonds, upon which the Bank was to receive 20% commission. The Bank had Mr. Noonan investigate the bonds. The defendant gave the Bank a copy of a statement made by certain engineers in Chicago, who had been sent down to examine the coal properties. The Bank sold \$1,000 of the bonds and, finally, in October, 1922, gave up trying to sell them. The Bank meanwhile, in October, 1922, had been notified by the State Auditor not to handle the bonds. Following that, the defendant, Noonan and the witness entered into an agreement to sell the bonds. No express contract was entered into by them with the Coal Company. Apparently, the same contract that had been made between the Coal Company and the Bank was used, and no new one made. The contract between the three, the witness, the defendant and Noonan, was dated October 1, 1922, signed by the three and provided that as they had entered into a contract with the Coal Company to sell \$250,000 of the bonds of that company, and they were to pay the Coal Company \$20.00 for each \$100 of bonds sold, it was agreed by and between the three parties that the profits on the sale of the bonds were to be distributed as follows: \$7.00 of each \$100.00 of bonds sold, to go to the defendant; \$6.00 to the witness; \$3.00 to Noonan, and \$4.00 for expenses; that if the expenses turned out to be more than the amount estimated, then his, the witness's shares and Noonan's were to be reduced proportionately.

After that contract was made, they started to sell bonds, and went to some expense in making sales. About that time the defendant went to the office of the witness

and the bank, whereby the bank undertook to sell the
\$250,000 of the bank's bonds, upon which the bank
was to receive 5% commission. The bank had Mr. Rogers
investigate the bonds. The defendant gave the bank a
copy of a statement made by certain witnesses in Chicago,
who had been sent down to examine the bank's books.
The bank sold \$250,000 of the bonds and, finally, in October,
1902, gave up trying to sell them. The bank meanwhile
in October, 1902, had been notified by the State Auditor
not to handle the bonds. Following that, the defendant,
Rogers and the others covered into an agreement to sell the
bonds. The witness statement was obtained from the bank with
the bank's approval. Apparently, the bank consented that the
bank made between the bank's approval and the bank was made,
and at that time. The agreement between the three
the witness, the defendant and Rogers, was dated October
1, 1902, signed by the three and recited that as they
had entered into a contract with the bank to sell
\$250,000 of the bonds of the bank, and they were to
pay the bank \$25,000 for each \$100 of bonds sold,
it was agreed by and between the three parties that the
witness on the sale of the bonds were to be distributed
as follows: \$7.50 of each \$100.00 of bonds sold, to be to
the defendant; \$2.50 to the witness; \$5.00 to Rogers, and
\$2.50 for expenses; that if the expenses turned out to be
more than the witness estimated, then the witness
should be allowed to be repaid the difference.
That the witness was paid, that witness was
paid before, and that in each instance of selling bonds, the
last time the defendant went to the witness in the witness

and told him that there was a note of the President of the Coal Company for \$5100.00, which was due to the former owners of the coal mines which had to be paid; that if it was not paid, the former owners of the mines would cause trouble in the selling of the bonds. The Bank then paid the note. Various items of expense had been incurred by the Bank in order to bring about a sale of the bonds. At the outset the Bank had printed 20,000 circulars and prospectuses. The total expenses of advertising, of engineers who had been sent to the mines to investigate, and for agents to sell the bonds, and for clerks, was altogether about \$7,000; that was in addition to the \$5100, which was paid out by the Bank. When asked how much the Bank paid for advertising expenses, he answered, "I personally didn't want the Bank shall pay all these expenses, and for that reason I paid these expenses. The Bank paid these expenses and charged to my account in the Bank. The Bank charged to my account, which was not covered by me." The \$7,000.00 and the \$5100.00 were charged to his account. Just prior to October 15, he told the defendant in the presence of Noonan, that he, the defendant, had promised to sell the bonds and had said every day that he had sold the bonds, and that in a few days he would have the money. He told the defendant that the Bank was already at an expense of \$11,000, and that those expenses must be covered at once, because the State Auditor was demanding it, and because he and Noonan were losing confidence in him, the defendant, and that he would like to get rid of the whole deal and make some settlement. The three of them had a meeting, and "it was decided that Mr. Dickinson is covering the total expenses of the International State Bank;"

and told him that there was a note of the President of the
Bank Company for \$100,000, which was due to the Bank Company
at the end of the month which had to be paid; that it was not
paid, the former owners of the mine would cause trouble in
the selling of the bonds. The Bank then paid the note.
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The total expense of advertising, of engineering who had
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which was not covered by me." The \$7,000.00 and the \$100,000
were charged to his account. Just prior to October 15,
he told the defendant in the presence of Woods, that he, the
defendant, had promised to tell the Bank and had said very
little that he had said was correct, was that in a few days he
would have the money. He told the defendant that he was
not at all at all at all at all, and that he was not
going to be at all at all, because the Bank would not be
making it, and because he had known that the Bank would
in him, and because, and that he would like to see him
the whole thing and more some settlement. The Bank of then
had a written and the Bank had not been able to
settling the whole expense of the advertisement, the Bank

"Will cover the total expenses made by the International State Bank up to November 15, 1937. It was figured out by Mr. Noonan, all the expense which has been made around \$13,000, and for that Mr. Dickinson is going to receive over 30% commission, which first the bank was entitled to, and then we three were entitled to;" that he, the witness, and Noonan were going to turn over their interest in the \$50,000 bonds under the contract to Dickinson, and "he was going to pay up this indebtedness." The defendant told him, the witness, "I am going in a day or two to sell at least \$55,000 of bonds, and we will have cash money to cover this shortage at the Bank." "When Mr. Dickinson agreed to cover the expense it was decided to take out from the books the expense which has made in connection with these bonds, which amounted to about \$7,000.00 and which was charged to my (the witness's) account; also Mr. Noonan had made a new trust deed for these bonds on which he was working for four or five months, and he also demanded of Mr. Dickinson that he shall be paid \$4,000.00 for these services." When asked, "What did Dickinson say to that?" the witness answered: "Against Mr. Noonan the Bank has an account of \$4,000.00, which Mr. Noonan is owing to the Bank, and then it was decided that Mr. Noonan's bill be paid by Mr. Dickinson to the Bank, and for that reason there was wiped out from the books of the Bank the \$4,000 account of Mr. Noonan, and \$7,000 charged against me. It was about \$11,136.35." When asked, "Was there ever any document left by you in the Bank or vault showing the amount?" he, the witness, answered, "Yes, in the vault of the Bank was put a slip as cash in the vault having my sig-

with money the total expenses were of the following kind:
From March 10 to November 10, 1922. It was figured out by
Mr. Henson, all the expenses which had been made during
\$12,000, and for that Mr. Henson is going to receive
over \$200 commission, which thing the bank was entitled to,
and then we were entitled to; that is, the witness,
and Henson were going to turn over their interest in the
\$20,000 bonds under the contract to Henson, and "he was
going to pay up this indebtedness." The witness told
him, the witness, "I am going to a day or two to call at
least \$20,000 of bonds, and we will have good money to
cover this shortage of the bank." When Mr. Henson
agreed to cover the expense it was decided to take out
from the books the expense which was made in connection
with these bonds, which amounted to about \$7,000.00 and
which was charged to the Henson's account; also
Mr. Henson had made a new firm deal for these bonds and
which he was working for that at first, and it was
demanded of Mr. Henson that he should be paid \$2,000.00
for these services. When asked, "What did Henson say to
that?" the witness answered, "Against Mr. Henson the bank
has an account of \$2,000.00, which Mr. Henson is owing to
the bank, and that it was decided that Mr. Henson's bill
be paid by Mr. Henson to the bank, and for that reason
there was signed and then the bill of Mr. Henson the \$2,000
account of Mr. Henson, and \$7,000 charged against me.
It was about \$11,000.00. When asked, "Was there any
any document left by you in the bank at that time?" the
witness said, "The witness, however, in the month of
the bank was not a thing as such as the bank's property was."

nature." When asked "What did Mr. Dickinson do then?" the witness answered, "Mr. Dickinson gave his note to the Bank to secure this cash in the vault, of \$15,000." The reason the amount was \$13,000 and not \$11,136.35, was because the slip in the vault was made on November 2, and between that time and November 15, Noonan figured out that there had been spent between \$1200 and \$1300 more in connection with the promoting of the bonds, the money which had been paid to the agents.

When asked by the court why he, the witness, took a note, and why Dickinson did not pay cash, the witness answered, "Because I demanded cash. Mr. Dickinson wanted the Bank to give him a loan on this note, but I refused to give him a loan, and I said that a loan by anyone from the Bank must be approved by the directors."

When asked by the court how he, the witness, came to take the note, he answered: "First, I took his note because he promised to pay cash, and didn't. Dickinson said he was going to pay cash on the sale of \$55,000 of the bonds; that they were already sold, and he would have the cash in a day or two." When asked by the court, "Why didn't you wait two or three days?" the witness answered, "Because I was tired of waiting and we wanted to have some security and some showing that he was willing to pay this expense." The reason a note was not taken for \$16,000 or \$17,000, covering the \$7,000 advanced by the Bank, and the Noonan \$4,000 and the \$5100, was because Noonan and Dickinson decided that the \$5100 could be demanded directly from the Coal Company, though, as a matter of fact, the first note that was made out was made out for \$17,000, and then destroyed, and another made

... "When asked 'What did Mr. Robinson do with the money?' Mr. Robinson gave him a note for the sum to receive this cash in the amount of \$15,000." The amount the money was \$15,000 and not \$11,126.25, and because the slip in the vault was made on November 2, and because that the end November 12, money appeared and that there was some amount between \$1000 and \$1500 more in connection with the proceeds of the bonds, the money which had been paid to the agent.

When asked by the court why he, the witness, took a note, and why Robinson did not pay cash, the witness answered, "Because I intended cash, Mr. Robinson wanted the cash to give him a loan on that note, but I refused to give him a loan, and I said that a loan by any one from the bank must be approved by the directors." When asked by the court how he, the witness, came to this conclusion, he answered, "First, I took his note because it appeared to pay cash, and second, Robinson said he was going to pay cash on the note of \$15,000 or the bonds; that they were already sold, and he would have the cash in a day or two." When asked by the court, "Why didn't you tell the bank or these men, the directors, because I was then in a position to be asked to have some money and some money that he was willing to pay this amount." The witness answered that he did not tell the directors, because he was not a member of the bank, and the directors, \$1,000 and the \$1,000, and because Robinson and Robinson decided that the bank would be damaged if they told the directors.

out, the one in question, for \$13,000; that was done about November 2 or 3.

On November 15, the matter was closed up, and nothing further done. The Bank at that time had some of the bonds, probably to the extent of \$100,000. When asked if any bonds were turned over to Dickinson at the time the note was made, the witness answered, "Fifty Five Thousand; Dickinson always said \$50,500. Two weeks after that time, the Bank was closed. On December 2, 1922, a box was rented in the Security Trust & Deposit Company, in the name of the College Coal & Mining Company, by him, the witness, which was rented at the suggestion of Dickinson, because he had some documents of the Coal Company. The box was in both names. Dickinson told him that the box was necessary in order to deposit the trust deed, contract and some other papers which he would like to show to people in connection with the sale of the bonds. He, the witness, went to the box several times. It was about November 15 when he turned over \$50,000 or \$50,500 of the bonds. There was still in the hands of the Bank something over \$100,000 in the bonds. When asked how it happened that he turned over only part of the bonds and if there was a complete settlement, he answered, "Just because it was agreed that Mr. Dickinson was going to receive the total commission which the Bank was to receive;- \$50,000 Mr. Dickinson wanted to have turned over to him, to equal the commission, \$50,000." Although the bonds all the time were the property of the Coal Company, he did not know why, when the note was made out

...the one in question, the 11th, that was the same

On November 15, the letter was dated up, and
nothing further done. The bank at that time had some \$1
in funds, probably to the amount of \$50,000. From what
it was known was known over to Dickinson on the line the
one was made, the witness answered, "Ninety five thousand;
I think. I think said \$50,000. Two weeks after that time,
the bank was closed. On December 8, 1933, a man was working

[illegible]

For the first time, the world has seen a woman in the White House.

to the Bank, all the bonds were not returned to the defendant. He denied that at the time the box in the Security Trust & Deposit Company was rented, on December 2, that the bonds were taken and deposited in that box in the joint account of himself and Dickinson, and denied that he took from the box certain of the bonds and sold them himself. The expense of \$7,000 was made up of the following: \$2,000 for advertising, \$2500 for printing and photographs made of the mines; \$1500 to the engineers, \$1,000 to agents and salesmen. There were about a dozen salesmen working for two months; also, there was an expense of about \$800.00 for stamps, and \$400.00 for clerks. On the books of the Bank it was charged against him. He used to give out his personal check in the name of the Russian-American Bureau. "The Bank paid out and charged against the account of the Russian-American Bureau, and when the account was overdrawn \$7,000, then I told Mr. Dickinson, I'm not going to pay any more." The Russian-American Bureau account was overdrawn about \$7,000. On November 15, he, the witness, and Noonan told Dickinson, "that all the whole expenses of the Bank had to be paid by cash, and Dickinson promised, and said in two or three days he was going to sell the bonds." They told the defendant that they were going to keep the note until he paid the cash money to the Bank. The note made out for \$13,000 contained, in addition to the \$4,000 and \$7,000, certain other items and expenses amounting approximately to \$2,000; that Noonan made the statement of the items. No interest up to November 15 was included. \$13,000 was just the even amount of money that had been advanced. The \$5100 due to the previous owners of the Coal Company had been paid

by the Bank. The Bank was organized on January 1, 1921. Noonan was a director of, and also attorney for the Bank. He did not tell the defendant that he wanted the note in question discounted at the Continental and Commercial Bank, as at that time the Bank did not owe the Continental and Commercial Bank anything.

When asked if anything was said to the defendant when the note was given about giving credit, and whether credit was given by the Bank to anybody, the witness answered, "It was cash in the vault." When asked whether the note was simply carried as a cash item, he answered, "No, this note was not carried into the vaults. This note was in my desk, and to secure the slip in the vault of the cash account." Noonan's account was credited on the books of the Bank with \$4,000, and his, the witness's, account credited with \$7,000. The defendant told him on several occasions that his notes were not usually negotiable; and that he had no account in any bank. ~~At the time the witness~~
~~the witness did not know anything about the Continental and Commer-~~
~~cial Bank.~~

One Elliott, the former President of the Coal Company, testified that the bonds were dated June 1, 1922, and were worth one hundred cents on the dollar; that he met Dickinson in May, 1922; that he doesn't think the defendant sold any of the bonds after November 15, 1922, although he, the defendant, had hypothecated \$3500 worth of bonds with a firm on La Salle Street, and \$5,000 with one Callahan; that Dickinson, on November 15, 1922, told him that the bonds were sold; told him that he, the defendant, had \$50,000 in

bonds; that it was stipulated at a hearing before Master in Chancery Doyle that Dickinson had \$50,500 of the bonds in his possession. He further testified that the reputation of the defendant in Chicago for truth and veracity was bad.

From the foregoing, bearing in mind that a judgment by confession had been entered and then opened up to give the defendant an opportunity to make out a defense, and that, therefore, the burden of proof, that the note was one for accommodation and without consideration, was upon him, it is our judgment that the affirmative defense, testified to by the defendant, was not made out. Evidently, from what the record discloses, the trial judge did not believe the defendant's claim that Braslawsky asked him to accommodate the Bank with his note and that it was given only for that purpose and without consideration. Considering then the argument made here by counsel for the defendant, the question arises whether the evidence as to what actually transpired, as it is chiefly related by Braslawsky, affirmatively proves that the note was given as a matter of accommodation and was without consideration.

The evidence of Braslawsky is that at the solicitation of the defendant, a contract was made between the Coal Company and the Bank to sell \$250,000 of bonds for a commission of 20%, and that, having tried and failed to sell the bonds and having been notified by the State Auditor to close the matter up, a contract was then made, which was dated

has not been used for one or more of the following reasons:

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THE UNIVERSITY OF CHICAGO PRESS

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* 總發行所：東京市丸の内區千代田二丁目一番地

1990年12月10日

[illegible]

*This is not subject to GDS, 2001. Item of 2002 will be renewed.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Source: U.S. Census Bureau, *Marriage, Divorce, Remarriage in the 1990s*, Current Population Reports, 1995.

Not at all. I am not a member of the organization.

October 1, 1922, between Braslawsky, Noonan and the defendant, and then, that having failed of success, negotiations were entered into in the latter part of October, which resulted in an agreement which provided that the defendant should assume or settle whatever expense the Bank had been put to in the matter, which was figured at about \$13,000, and that Braslawsky and Noonan would give up their interest under the contract of October 1, thus turning over to Dickinson the right to the full 20% commission; and that, in addition they should turn over to the defendant \$50,000 of the bonds.

The evidence of Braslawsky is to the effect that as the result of that agreement the defendant gave the note in question to the Bank; and further, that as the defendant said he would sell at least \$55,000 of bonds in a few days, Braslawsky took the note for the Bank, and, to make a record of the transaction, put a slip for the amount of the note in the vault as representing cash.

The evidence of Braslawsky, more fully stated, as to the final agreement, is that just prior to October 15, he told the defendant in the presence of Noonan that he, the defendant, had promised to sell the bonds, and said every day that he had sold the bonds, and that in a few days he would have the money, that the Bank was already at an expense of \$11,000, and that those expenses must be covered at once, because the State Auditor was demanding it, and that as they were losing confidence in him, Braslawsky would like to get rid of the whole deal and make some settlement; that following that they met and it was

October 1, 1935, between Kinsman, Korman and the defendant, and that, that having failed to succeed, negotiations were entered into in the latter part of October, which resulted in an agreement which provided that the defendant should assume or make whatever expense the Korman had been put to in the matter, which was figured at about \$12,000, and that Kinsman and Korman would give up their interest under the contract of October 1, thus turning over to Kinsman the right to the fully paid commitment and that, in addition they should turn over to the defendant \$20,000 of the funds.

The witness of Kinsman is to the effect that on the receipt of that agreement the defendant gave the Korman a check for the sum of \$20,000, that at the defendant said he would sell at least \$20,000 of bonds in a few days, Kinsman took the note for the \$20,000, and to make a record of the transaction, but a slip for the amount of the note in the bank as representing cash.

The witness of Kinsman, more fully stated, as to the final agreement, is that just prior to October 1, he told the defendant in the presence of Korman that he, Kinsman, had promised to sell the bonds, and said every day that he had sold the bonds, and that in a few days he would have the money, that the Korman was already at an expense of \$12,000, and that those expenses were covered at once, because the Korman had been demanding it, and that as they were losing confidence in him, Kinsman would like to get rid of the whole deal and make a commitment; that following that day and 11 days

agreed that the defendant should cover all the expenses of the Bank up to November 15, 1932, which it was figured out by Noonan was about \$13,000; that as a consideration for that obligation Dickinson would receive 30% commission, which at the outset the Bank would have been entitled to, and which under the subsequent agreement the three of them would have been entitled to. That evidence, we think sufficiently shows that the note in question was not given as accommodation and without consideration, but was given so that the defendant might obtain the right to the full commission and to the possession of a certain portion of the bonds, either of which elements would be sufficient in the way of consideration to make the defendant liable to the Bank.

To reiterate, as the evidence shows that when the note was given it was agreed between Braslawsky, Noonan and the defendant that the latter should take all the commission, which formerly he had not been entitled to, and that in consideration therefor he should pay the expenses, which amounted approximately to \$13,000, and which just prior to that time all three of them may have been jointly liable for, it follows that there was a good consideration for the note. As to the claim of the defendant that Braslawsky wanted the note to turn over to the Continental and Commercial, that is answered by Braslawsky who testified that the Bank was not indebted to the Continental and Commercial Bank and further that the defendant had no bank account and said that his notes were not usually negotiable.

agreed that the defendant should cover all the expenses of the trip up to November 15, 1958, which is was figured out by income was about \$15,000; that as a consideration for that obligation defendant would receive 50% commission, which at the outset the bank would have been entitled to, and when under the independent agreement the three of them would have been entitled to. That otherwise, no bank actually knew that the note in question was not given as a commission and without negotiation, but was given so that the defendant might obtain the right to the full commission and to the possession of a certain portion of the funds, either of which elements would be sufficient in the way of consideration to make the defense not liable in the bank.

7. Further, as the defendant knew that the bank was going to sue the bank for the money, and that the defendant had the letter should state all the commission, and that he had not been entitled to, and that in some situation the bank should pay the expenses, which amount of approximately \$15,000, and which that note to state since all three of them have been jointly liable for, it follows that there was a good consideration for the note. As to the claim of the defendant that knowingly, wanted the note to turn over to the defendant and defendant, that is supported by testimony and testified that the bank was not intended to the defendant and defendant and that the note that the defendant had no bank account and said that the note was not really negotiable.

It is urged that the \$50,000 of bonds that were turned over to the defendant were received long after the note was signed, and did not constitute in any way any consideration for the defendant's note. Braslawsky testified that the defendant wanted the \$50,000 in bonds turned over to him, as they equaled the amount of the commission. It is true that the evidence is somewhat confusing on that subject, but it does show that the bonds were turned over, and the testimony of Braslawsky suggests that they were turned over because the defendant had stated that they were already sold, and that, therefore, "he would have the cash in a day or two." The evidence on that subject tends to support the claim of the plaintiff that the note was not given as accommodation and without consideration, but that there was a definite consideration for it; and, on the other hand, it certainly does not tend to help in any way, the claim, which the defendant was bound to support by sufficient evidence, that the note was given as a matter of accommodation and without consideration.

Some contention is made for the defendant that the evidence fails to show that the actual consideration amounted to \$13,000; that the evidence of Braslawsky as to the difference between \$11,136.35, being part of the expenses of the Bank, and \$13,000, the amount of the note, was not clearly shown. With that we cannot agree. We think it was amply shown by the testimony that the amount of the note was made up of \$7,000, general expenses of the Bank; \$4,000 of Noonan's account, and a certain amount, which was evidently estimated

It is urged that the \$50,000 of bonds that were turned over to the defendant were received long after the date was signed, and did not constitute in any way any consideration for the defendant's note. Materially, Justice stated that the defendant received the \$50,000 in bonds turned over to him, as they appeared the amount of the consideration. It is true that the evidence is somewhat conflicting on that subject, but it does show that the bonds were turned over, and the testimony of the defendant suggests that they were turned over to him. The defendant had stated that they were already sold, and that, therefore, he would have the cash in a day or two. The evidence on that subject tends to support the claim of the plaintiff that the note was not given in consideration and without consideration, but that there was a definite consideration for it, and, on the other hand, it certainly does not tend to help in any way the claim which the defendant was bound to support by sufficient evidence, that the note was given as a matter of consideration and without consideration.

That consideration is what the plaintiff has to establish. It is in fact the actual consideration received by the plaintiff, and the defendant's testimony on that subject is to the effect that the bonds were turned over to him, as they appeared the amount of the consideration. It is true that the evidence is somewhat conflicting on that subject, but it does show that the bonds were turned over, and the testimony of the defendant suggests that they were turned over to him. The defendant had stated that they were already sold, and that, therefore, he would have the cash in a day or two. The evidence on that subject tends to support the claim of the plaintiff that the note was not given in consideration and without consideration, but that there was a definite consideration for it, and, on the other hand, it certainly does not tend to help in any way the claim which the defendant was bound to support by sufficient evidence, that the note was given as a matter of consideration and without consideration.

as an approximation at the time the note was made and was subsequently found to be the amount which made up the difference, that is, \$2,000.00.

It is urged for the defendant that the note was never delivered to the Bank and is, therefore, void. The note itself was made out to the "International State Bank" as payee. It is admitted by the defendant that it was delivered by him to the Bank, although, he claims it was only as an accommodation. That being true, even though Braslawsky did testify that he had possession of it, as he was the president of the Bank and testified it was the Bank's property, the only reasonable inference is that there was a sufficient delivery. Further, the defense set up in the affidavit of merits does not in any way dispute delivery, but, on the other hand, actually admits it.

It may, also, be said, moreover, apart from the evidence of actual consideration that even if Dickinson's version of the transaction was undisputed, his defense would be unavailing, because it appears from his own testimony that he executed the note in question to keep the Bank from becoming bankrupt and that he gave the note, according to his own testimony, for the purpose of making an appearance of assets in the Bank. In these circumstances, it is the law that although the Bank might not be able to maintain a suit upon the note, yet the Receiver, representing the creditors, could do so. Golden v. Servenka, 378 Ill. 409. In that case the court said (p. 437):

an examination of the bank the same was found to be
substantially correct to be the amount which was made up the
difference, that is, \$2,000.00.

It is noted for the defendant that the money
was never delivered to the bank and it is further noted
that the money itself was made out to the "International Bank"
which is correct. It is admitted by the defendant that
it was delivered by him to the bank, although, in witness
it was only an accommodation, that being true, even
though occasionally did testify that he had possession of it, as
he was the president of the bank and testified it was the
bank's property, the only reasonable inference is that
there was a sufficient delivery. Further, the delivery
was up to the ability of the bank and it was not
disputed delivery, but, on the other hand, actually admitted

It may, also, be said, however, again from the
evidence of actual examination that over \$2,000.00 was
received of the transaction was maintained, the balance
would be sufficient, because it appears from his own testi-
mony that he received the \$2,000.00 in cash from the
bank from the bank's account and that he gave the money
amounting to his own testimony, for the purpose of making
an account of cash in the bank. In these circumstances,
it is the law that although the bank was not to make
him a suit upon the note, but the recovery, representing
the cash, could be made by the bank. The bank is
not, in that case, the party which is liable.

"Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business, although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped, upon the insolvency of the bank, to allege want of consideration."

Considering all that the record discloses, we feel bound to conclude that it fails to show that the note was given as an accommodation to the Bank, or without consideration.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

THOMSON, F.J. AND O'CONNOR, J. CONCUR.

[illegible]

1941

126 - 30384

PEOPLE, ex rel MARYAN SKLARSKI,)

Appellee,

v.

WILLIAM E. DEVER, ET AL,

Appellants. }

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

241 I.A. 608

Opinion filed March 10, 1936.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 7, 1935, the relator, Maryan Sklaraki, filed, in the Superior Court, a petition for a writ of mandamus against the defendants, City of Chicago, William E. Dever, Thomas P. Keane, Al. F. Gorman and Morgan A. Collins, for the purpose of compelling the respondents to issue a Class "A" retail beverage dealer's license, under Article VII of Chapter 67 of the Chicago Municipal Code of 1922. The respondents demurred to the petition and, upon the demurrer being overruled, the court granted a writ of mandamus, as prayed in the petition. This appeal is from that judgment.

It is alleged in the petition substantially as follows: That sections 3464 to 3469, both inclusive, of the Chicago Municipal Code of 1922, are as follows:

"3464. Retail beverage dealer defined: For the purpose of this article the term 'retail beverage dealer' shall be held to include any person, firm or corporation selling, offering for sale, or keeping with the intention of selling at retail, either in bottles or other containers, for consumption on the premises, any malted, cereal or vinous non-intoxicating beverages as defined by law, or

PROCEEDING OF THE HONORABLE JUSTICE

APPEAL

ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

DOCK COUNTY

241 I.A. 608

APPEAL

Opinion filed March 10, 1938.

THE HONORABLE JUSTICE OF THE

DOCK COUNTY

ON February 7, 1938, the petition, known as

filed, in the Superior Court, a petition for a writ of

demanded against the defendant, City of Chicago, William E.

Dever, Thomas E. Jones, A. E. Jones and Eugene A. Collins.

For the purpose of annulling the respondents to issue a

class "A" retail liquor license, which article

All of Chapter 67 of the Chicago Municipal Code of 1935. The

respondents demanded in the petition and, upon the demand of

any respondent, the court granted a writ of certiorari, as prayed

in the petition. This appeal is from that judgment.

It is alleged in the petition substantially as

follows: That sections 2800 to 2805, both inclusive, of the

Chicago Municipal Code of 1935, are as follows:

"This article, known as 'Retail Liquor License', is a part of the Code of the City of Chicago, Illinois, and shall be held to include any person, firm or corporation selling, offering for sale, or loaning to the licensee or selling at retail, spirit in bottles, on other containers, for consumption on the premises, any spirit, except as otherwise provided in the Code of the City of Chicago, Illinois."

any soft drinks, carbonated beverages, fruit juices, waters, milk, buttermilk, chocolates, tea, bouillon or other beverages.

"3465. License required: No person, firm or corporation shall engage in the business of a retail beverage dealer without first having obtained a license for each stand, place, room or inclosure, or for each suite of rooms or inclosures which are in direct connection or communication or contiguous to each other.

"3466. Classification - fees: For the purpose of this article retail beverage dealers are classified, and the license fees for each class are fixed as follows:

"Class "A": This class shall include retail beverage dealers handling any and all of the beverages enumerated in Section 3464, including malted, cereal or vinous non-intoxicating beverages as defined by law. The annual license fee for this shall be one hundred dollars.

"Class "B": This class shall include retail beverage dealers selling the beverages enumerated in Section 3464, but not including malted, cereal or vinous non-intoxicating beverages as defined by law. The annual fee for this class shall be five dollars; provided, however, that where such licensee has seating accommodations for more than ten persons he shall pay, in addition thereto, fifty cents for each chair, and if said licensee shall have seating accommodations for more than ninety people he shall pay a maximum license fee of fifty dollars; and provided, further, that seats provided in licensed billiard rooms solely for the accommodations of the players or of the spectators during play shall not be included in the computation of seating accommodations in the determination of the license fee for the sale of beverages enumerated in Section 3464, not including malted, cereal or vinous non-intoxicating beverages as defined by law.

"In case an ice cream parlor or coffee house or ordinary is conducted, operated or carried on in the same establishment in which the business mentioned as either Class "A" or Class "B" in this article is also conducted, operated, managed or carried on, the owner or proprietor thereof shall be required to take out only one license, and that license shall be that which requires the payments of the highest license fee under any one of the three license ordinances.

"All licenses issued under the provisions of this article shall expire on December 31st following the date of issuance.

any other article, substance, beverage, fruit
juice, water, milk, custard, chocolate,
tea, coffee or other beverage.

"Section 1. The following shall be deemed to be
the principal items in the business of
a hotel, restaurant, bar, or other place
where food or drink is served, and shall be
subject to the same rules and regulations as
other food or drink served in such place.

"Section 2. The following shall be deemed to be
the principal items in the business of a
hotel, restaurant, bar, or other place
where food or drink is served, and shall be
subject to the same rules and regulations as
other food or drink served in such place.

"Section 3. The following shall be deemed to be
the principal items in the business of a
hotel, restaurant, bar, or other place
where food or drink is served, and shall be
subject to the same rules and regulations as
other food or drink served in such place.

"Section 4. The following shall be deemed to be
the principal items in the business of a
hotel, restaurant, bar, or other place
where food or drink is served, and shall be
subject to the same rules and regulations as
other food or drink served in such place.

"Section 5. The following shall be deemed to be
the principal items in the business of a
hotel, restaurant, bar, or other place
where food or drink is served, and shall be
subject to the same rules and regulations as
other food or drink served in such place.

"Section 6. The following shall be deemed to be
the principal items in the business of a
hotel, restaurant, bar, or other place
where food or drink is served, and shall be
subject to the same rules and regulations as
other food or drink served in such place.

***3467. Application-special requirements:**

Any person, firm or corporation engaged in the business of a retail beverage dealer as defined in this article shall make application in writing for a license so to do which shall conform to the general requirements of this ordinance relating to applications for licenses. Such applications shall also state the length of time that said applicant, if an individual, has resided in the city, his place of previous employment, whether married or single, whether he has ever been convicted of a felony or misdemeanor, and whether he has been summoned to court in a criminal proceeding, which statement shall be signed and sworn by the applicant and filed with the City Collector as a permanent record. The City Collector shall forward the application to the Superintendent of Police for investigation. The investigation of all applications for licenses under the provisions of this article shall be conducted under the supervision of the Captain of the Police District in which the applicant shall reside, and when such investigation is completed the application shall be forwarded by the Captain to the office of the Superintendent of Police, who, if such investigation proves satisfactory, shall endorse his recommendation thereon and forward the same to the City Collector. No license shall be issued to any person under the provisions of this article who has been convicted of a felony.

***3468. Suspension-revocation:** Any individual, licensee or corporation who shall permit a violation of the city ordinance within said licensed establishment shall for the first violation have his license suspended by the Mayor for a period of thirty days, for the second violation for a period of sixty days, and upon the third violation said license shall be revoked by the Mayor and the license of said applicant shall not again be restored; provided, however, that the Mayor shall have the right, in his discretion, to revoke said license upon the first or second violation.

***3469. Penalty:** Any person, firm or corporation violating any of the provisions of this article shall be fined not less than twenty five dollars, nor more than two hundred dollars for each offense, and every day that a violation of this article shall continue shall constitute a separate and distinct offense.*

That on January 12, 1925, the relator made application for a Class "A" retail beverage dealer's license pursuant

to said ordinance; that said application for said license was refused and no license was issued to him to operate said business of a retail beverage dealer at No. 4800 South Lincoln street, in the City of Chicago, as requested by him in his application; that he has complied with all the requirements of the ordinance regulating applications for a license to conduct a Class "A" retail beverage business, and is qualified to make such application, and to receive such a license; that he has resided in the City of Chicago for fourteen years, and is a married man, residing with his family at 4800 South Lincoln street, and has never been convicted of a felony or misdemeanor; that if the license which is sought to be obtained by him is granted, it will not be used at any time or in any way to violate the laws of the State of Illinois, or the city ordinances of Chicago; that he has not violated, nor permitted the violation of any of the ordinances of the City of Chicago; that being a person of good moral character, the refusal to recommend the issuance of a Class "A" retail beverage dealer's license to him, and the refusal to issue to him a license, was illegal and discriminatory on the part of the respondents; that it was the duty of the respondents to recommend and to issue a Class "A" retail beverage dealer's license to allow him to operate as a retail beverage dealer at 4800 South Lincoln street, Chicago, but the respondents have refused and still refuse to recommend the issuance of, or to issue such a license.

That he has demanded of the respondents that a license be issued to him to operate as a Class "A" retail

to said premises, that said application for said license
was refused and no license was issued to him to operate
said business of a retail beverage dealer at No. 4000 South
Loomis Street, in the City of Chicago, as requested by
him in the application; that he has complied with all the
requirements of the Liquor Control Commission, Illinois, in
order to obtain a Class "A" retail beverage license,
and is entitled to make such application, and to receive
such a license, that he has resided in the City of Chicago
for twelve years, and is a native born American citizen,
his family of 4000 South Loomis Street, in the City of
Chicago, consisted of a family of nine persons; that it was
further stated in order to be obtained by him in Chicago,
it will not be used in any way or in any way to violate
the laws of the State of Illinois, or the city ordinance
of Chicago; that he has not violated, nor permitted the
violation of any of the provisions of the City of Chicago;
that being a person of good moral character, the referee
has recommended the issuance of a Class "A" retail beverage
license to him, and the referee has issued to him
a license, and Illinois, and Commission on the part of
the Commission; that he has the right to sell and
the Commission has issued to him a license to operate
retail business to sell and still retain his license
the license of, or to issue such a license.

That he has obtained of the Commission's that a
license be issued to him to operate as a Class "A" retail

beverage dealer, and has tendered the annual license fee of \$100.00, and is ready, able and willing to pay said license fee if the license is issued to him.

That the petitioner prays for a writ of mandamus directed to the respondents, demanding them forthwith to approve the application and recommended the issuance of said license, and to forthwith issue the license to him, authorizing him to open, conduct, maintain and operate a retail beverage dealer's business at 4800 South Lincoln street, in the city of Chicago, upon his payment of the fee therefor, as provided in the ordinance.

No brief has been filed on behalf of the petitioner. In the brief for the respondents it is contended that the petitioner is insufficient in that it does not recite sufficient facts to make out a cause of action. Emphasis seems to be put upon the fact that the petition does not recite verbatim the application for the license.

It will be observed that the petition recites sufficient facts to notify the respondents of the exact nature of the petitioner's claim. It sets up that the petitioner is of good moral character; that he is the owner of the premises in question; the verbage of the ordinance in question; the date of the application for the Class 'A' license; that he made application pursuant to the ordinance; that his application for the license was refused and no license issued to him; that he has complied with all the requirements of the ordinance; that he is qualified to make the application and receive the license; that he

overweight, and has suffered the usual illness of
of \$100.00, and is ready, able and willing to pay said
amount, and the balance is known to him.

That the petitioner pays for a wife of \$100.00
directed to the respondent, demanding that the same be
approved the application and recommended the same to him,
said license, and to the said respondent, the license to him,
authorizing him to open, conduct, maintain and operate
a small business, and to the said respondent, the license to him,
and to the said respondent, the license to him,
the license, as provided in the petition.

It will be seen that on behalf of the peti-
tioner. In the order for the respondent it is suggested
that the petitioner is insolvent in that it does not
have sufficient funds to pay the same in cash.
The same means to be paid upon the fact that the petition
does not contain sufficient information for the license.

It will be observed that the petition recites
petitioner seeks to nullify the respondent of the same
nature of the petitioner's claim. It sets up that the
petitioner is at least partly insolvent, and is the
fact of the petition is suggested, the petition is the respondent
is suggested; the date of the application for the license is
suggested; and it is suggested that the respondent is the petitioner;
that the respondent the license was refused and no
license issued to him, and that the respondent is the petitioner;
and the respondent of the petition, and it is suggested that
with the application and request for license, that the

has resided in Chicago fourteen years, and is a married man, residing with his family at 4800 South Lincoln street, and has never been convicted of a felony or misdemeanor; that he demanded the license and tendered the annual license fee of \$100.00, but the license has been refused. Upon demurrer, we think that is sufficient. It is not necessary to recite in detail all the evidence which might be necessary to make out a case where there is an issue and trial. Prolixity of pleading is to be deprecated. If the defendants had any defense to the petition, that was easily available by answer or other appropriate pleading. It stated a cause of action, and as a matter of common sense, we are bound to hold that the petition did fully and sufficiently inform the respondents of the claim of the petitioner.

O'Brien v. Frazier, 226 Ill. App. 118; People, ex rel Randerdale v. City of Chicago, Gen. No. 30129. Counsel for the respondents have cited the following cases; People ex rel Younger, v. City of Chicago, 280 Ill. 560; People v. Brentano, 259 Ill. 359; People v. City of Streator, 258 Ill. 273; Gersch v. City of Chicago, 250 Ill. 551; People v. Busse, 248 Ill. 11; Moore v. The Mayor, 214 Ill. 40; Swift v. Klein, 183 Ill. 269; People, ex rel Hickland v. City of Chicago, 195 Ill. App. 48, but we do not find that any of them sustains the claim made. In no case that we know of has such a petition as the one here in question been held to be insufficient merely upon demurrer.

The judgment, therefore, will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

has resided in Chicago for many years, and is a married man residing with his family at 4800 South Lincoln Street, and has never been convicted of a felony or misdemeanor; that he obtained the license and bonded the annual license fee of \$100.00, but the license has been forfeited, from

[illegible]

...to be a matter of common sense, we are

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have recently suffered from a severe earthquake. The President expresses his sympathy for the victims and offers his assistance in rebuilding the state.

[illegible]

1. The Commission will be assisted by a Technical Committee, which will be composed of representatives of the various departments of the Government, and of the various branches of the industry.

135 - 30393

J. T. McDONNELL,

Appellee,

v.

CLAUDE W. MORRIS,

Appellant.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

241 I.A. 609

Opinion filed March 10, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment recovered by the plaintiff, J. T. McDonnell, against the defendant, Claude W. Morris, in a suit in the Superior Court, in the sum of \$106.66.

There was a trial before the court, without a jury. The evidence consisted of the testimony of the plaintiff and the defendant, and two exhibits.

The testimony of the plaintiff is substantially as follows:- He was a salesman for the United States Rubber Company, and having been notified by that Company that it would be necessary for him to move from Indianapolis to Chicago, he brought his family here, and in answer to an advertisement, went, on Saturday, August 6, to the office of the defendant to see about renting the lower apartment of a two-flat building known as 6530 North Rockwell Street. On that occasion he paid the defendant

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241 I.A. 609

Opinion filed March 10, 1932.

MR. JUSTICE LATIMER delivered the opinion of

the court.

Opinion of the court.

This is an appeal from a judgment rendered

by the Circuit Court of the United States for the District of Columbia.

The appellant, in a suit in the Circuit Court, is the

plaintiff.

The defendant is the United States.

The plaintiff is the United States.

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The plaintiff is the United States.

\$106.66 for the rent of the apartment from August 20 to October 1, 1921, and received a receipt which is as follows: "Aug. 6, 1921. Received of J. F. McDonnell \$106.66 as rent for 6530 N. Rockwell St., 1 Apt. @ \$80.00 per month; lease from Aug. 20, 1921, to Sept. 30, 1922 to be executed before Aug. 20, 1921, on form #10." He told the defendant at that time that he was leaving the City that day to arrange for the crating and shipping of his furniture to Chicago, and would return the following week, after he had established his family at a summer place. He came back on August 12, and telephoned to the defendant and told him that he was ready to sign the lease. The defendant told him that through some misunderstanding the lease was not ready, but that it would be all right for him to sign it when he came into Chicago to take possession of the apartment. He, the witness, said to the defendant, "Now, I am making application for lights, gas and telephone, are you positively sure it is all right for me to go ahead?" and the defendant answered, "You go right ahead." There was some further talk over the telephone and the defendant said that he, the witness, could sign the lease when he came to Chicago again. The witness then told the defendant that he would be in Chicago on the 20th. He came back to Chicago on August 22, and had his furniture, which was crated and packed in a box-car, transferred to the Rogers Park Station. He then went to the office of the defendant and asked for the key to the apartment, and the defendant told him that it was open. He went out to the apartment and looked around, but could not get in, so he went back to the office and said to the defendant, "That

1100.00 for the rent of the apartment from August 30 to
October 1, 1931, and received a receipt which is as
follows: "Aug. 31, 1931. Received of J. V. Macdonald
\$1100.00 as rent for 8250 E. Washelli St., 1 apt. 2, 1931
per month; same from Aug. 30, 1931, to Sept. 30, 1931
to be executed before me. J. V. Macdonald, on town 220. He
told the defendant at that time that he was leaving the
city that day to arrange for the estate and business
of his father-in-law, and would return the follow-
ing week, after he had contacted his family at a summer
place. He came back on August 17, and telephoned to
the defendant and told him that he was ready to sign the
lease. The defendant told him that through some misunder-
standing the lease was not ready, but that it would be all
right for him to sign it when he came into Chicago in
the possession of the apartment. He, the witness, said
to the defendant, "Now, I am making application for a
pass and telephone, are you positively sure it is all right
for me to be there?" and the defendant answered, "Yes, go
right ahead." There was some further talk over the tele-
phone and the defendant said that he, the witness, could sign
the lease and he would be in Chicago on the 30th.
He came back on August 30, and had his furniture,
which was stored and packed in a box-car, transferred to the
apartment house. He then went to the office of the de-
fendant and asked for the key to the apartment, and the
defendant told him that it was open. He went out to the
apartment and looked around, but could not get in, so he
went back to the office and told to the defendant, "I can't

place isn't ready." Whereupon the defendant said, "Are you any better than anybody else?" to which he, the witness, answered, "No, I'm not." "Well, what are you going to do about this thing?" The defendant responded, "You get away from here, I don't want to be bothered with you." He, the witness, then called up the office of the company that he worked for, and asked a Mr. Gunkle what he should do, and he was advised to get in touch with their attorney. He then went to the defendant again and said, "What about this lease of mine?" and the defendant said, "You get the h____ out of here, you will get nothing from me." Whereupon the witness walked out of the office. He never got possession of the premises, nor a lease, nor did he get back the \$100.00 which he had paid. After looking around for three days, during which time his family lived at a hotel, he moved into an apartment on Irving Park Boulevard. He was asked on cross-examination as to the condition of the premises on August 22, and he stated that there were no electric light fixtures, and no gas range in; no electric lead wires leading in from the alley to the apartment; that there was considerable sawdust and paper that came off the molding and fixtures, littered about the floor. The rental that he was to pay was \$80.00 a month. The rental he paid for the apartment on Irving Park Boulevard was \$90.00 a month. He told the defendant while negotiating with him that the proximity to a Catholic School was the reason he wished to rent the place.

The evidence of the defendant is substantially as follows:- In August, 1921 he was engaged in the business of

building and subdividing. On August 6, 1921, at his branch office, 2600 Devon avenue, Chicago, the plaintiff called and applied for an apartment in the 6500 block on North Rockwell street. He took the plaintiff's application for a lease, and gave him a receipt dated August 6, 1921, for rent from August 20, 1921 to September 30, 1921. The plaintiff told him he was going to Indianapolis to move his furniture to Chicago, and would move in on August 20. He asked him, the witness, to order electricity, gas and telephone, and the witness told the plaintiff that he could not do that, as he, the plaintiff would have to make application direct. Sometime after that, the plaintiff called up the offices of the defendant, but the plaintiff did not say anything about wanting a lease signed at that time, as far as he, the witness, could recollect. The next time he saw the plaintiff was on August 22, at the witness's office. On that occasion he, the witness, presented the plaintiff with a lease which was already prepared for him, the plaintiff, to sign. The plaintiff said, "I won't sign the lease, I want my money back. This is way out here on a prairie, no transportation, no schools, I want my money back." He did not say anything about the condition of the premises at that time. The premises at that time were not littered up, they were in spick and span condition, ready for a tenant's occupancy. When the plaintiff said he wished his money back as the property was not what he wanted, he, the defendant, told him that they could not refund it; that they entered into the contract in good faith and stood ready to deliver the premises to him upon his signature to the lease. Although he, the defendant, endeavored, by advertising and in the usual way

to rent the apartment, he was not able to do so until the following April. As to the lease that was introduced in evidence on behalf of the defendant, and which was Form No. 7, although the receipt of August 6, 1931 provided for a lease on Form No. 10, the defendant testified that the one introduced in evidence was the one that was submitted to the plaintiff. He denied that the plaintiff, on August 23, said anything about the condition of the premises, but stated that one of the reasons why he could not take the place was because it was out on the prairie, not close to transportation, nor to schools; that he said he wanted his money back. The building in question was four blocks from street car transportation.

The only point made in the brief for the defendant is that the judgment is manifestly against the weight of the evidence. As stated in defendant's brief, "the plaintiff and defendant stood alone and in wholly conflicting positions in their testimony." Obviously, therefore, the chief matter involved is one of credibility. If the trial judge believed the plaintiff, and his evidence was as stated by counsel for the defendant "that the defendant refused him a lease and chased him out of his office," and "when he tried to get in the building the place was full of litter and was locked, and on complaining about it to the defendant, he was told to get out," that was sufficient to justify the judgment. The plaintiff paid \$106.66 on August 6, and the receipt which the defendant gave him provided for the execution of the lease before August 20, on Form 10. That, of course, is admitted. The controversy begins with the telephone conversation that

to want the agreement, he was not able to do so until the following April. As to the facts that was introduced in

evidence on behalf of the defendant, that was not done

Mr. T. although the receipt of August 6, 1933 provided for a license on Form No. 14, the defendant testified that the one introduced in evidence was the one that was submitted to the plaintiff. He denied that the plaintiff

on August 22, made anything about the condition of the premises, but stated that one of the reasons why he could

not take the place was because it was not in condition, and

also in respect to the way in which it was

wanted his money back. It is stated in evidence that

because that street was dangerous.

The only point made in the trial for the defendant

is that the judgment is manifestly against the weight of

the evidence. As stated in defendant's brief, "the plaintiff

and defendant stood alone and in wholly conflicting positions

in their testimony." Naturally, therefore, the trial judge

involved in one of credibility. If the trial judge believed

the plaintiff, and his verdict was so stated by counsel for

the defendant "that the defendant received his money and

dismissed him out of his office," and "when he tried to get in

the building the place was full of liquor and was locked, and

at no time was it to the defendant, it was said to get

out," that was sufficient to justify the judgment. The plain-

iff paid \$100.00 on August 6, and the receipt which the de-

fendant gave him provided for the extension of the term for

the August 22, on Form No. 14. That, of course, is what

the defendant claims was the agreement between them.

is supposed to have taken place on August 12. From that on, the evidence of the one is diametrically opposed to that of the other. The testimony of the plaintiff that on August 22, when he asked about the lease, the defendant, practically, and with obscene language, drove him off the premises, if believed, in and of itself, was sufficient to justify the judgment.

In the view we take of the case, bearing in mind that the single subject of credibility was one of vital importance, and that the evidence, as we have said, is practically wholly conflicting, and considering the testimony of the plaintiff, and that, evidently he was believed by the trial judge, it would be altogether unreasonable for us to hold that there was not sufficient evidence to support the judgment, or that the judgment was manifestly against the weight of the evidence.

The judgment, therefore, will be affirmed.

AFFIRMED.

THOMSON, F.J. AND O'BURACK, J. CONCUR.

It is requested that you advise the Bureau of the results of your investigation.

that the single subject of credibility was one of vital importance, and that the evidence, as we have said, in respect to the subject of credibility, was unimpeachable and beyond question. The evidence, as we have said, in respect to the subject of credibility, was unimpeachable and beyond question. The evidence, as we have said, in respect to the subject of credibility, was unimpeachable and beyond question.

THE UNIVERSITY OF CHICAGO PRESS

1. The first group of variables includes the demographic characteristics of the respondent, such as age, sex, and education level. These variables are used to control for potential confounding factors that may influence the outcome variable.

152-20418

FRANKLIN LEON FELTY,
appellee,

vs.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY OF HARTFORD, CONNECTICUT,
a corporation,
appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

241 I.A. 609

Opinion filed March 10, 1926.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On June 26, 1925, the plaintiff, Franklin Leon Felty, brought suit in the Municipal Court against the defendant, Hartford Accident and Indemnity Company on a policy of burglary insurance for an alleged loss of property of the value of \$296.03. There was a trial before the court, without a jury, and a judgment in favor of the plaintiff in the sum of \$527.92. This appeal is from that judgment.

In the statement of claim it was alleged that on September 22, 1924, the defendant issued to the plaintiff a policy insuring him against all loss by robbery occurring at any time during the hours between 7 a.m. and 12 o'clock midnight, of property from within the premises or store of the plaintiff at 2842 Lawrence Avenue, Chicago, while the premises were regularly open for business. It was further alleged that on October 18, 1924, within the time and at the place covered by

100-1000

CHICAGO, ILL.
JANUARY 10, 1936

241 I.A. 609

RECEIVED
JAN 10 1936

Opinion filed March 10, 1936.

On March 10, 1936, the following opinion was filed:

The court, in its opinion, stated that the plaintiff, who was a resident of Chicago, Illinois, had brought suit against the defendant, who was a resident of the State of Illinois, for the recovery of the sum of \$100.00. The court found that the plaintiff had established a prima facie case and that the defendant had failed to establish a defense. The court therefore granted judgment in favor of the plaintiff for the sum of \$100.00, with interest thereon from the date of the filing of the complaint to the date of the judgment. The court also awarded the plaintiff its costs of suit.

In the statement of claim it was alleged that the defendant, on or about January 10, 1936, had wrongfully and unlawfully taken from the plaintiff the sum of \$100.00. The plaintiff alleged that the defendant had no right to take the money and that the plaintiff was entitled to its recovery. The defendant, on the other hand, alleged that the plaintiff had voluntarily given the money to the defendant and that the plaintiff was not entitled to its recovery. The court found that the plaintiff's evidence was more credible than the defendant's and that the plaintiff was entitled to its money.

The court also found that the plaintiff had established a prima facie case and that the defendant had failed to establish a defense. The court therefore granted judgment in favor of the plaintiff for the sum of \$100.00, with interest thereon from the date of the filing of the complaint to the date of the judgment. The court also awarded the plaintiff its costs of suit.

the policy, he, the plaintiff, was by robbery deprived of and caused to lose money, jewelry, goods, wares and merchandise, as follows:

"12 Size Boss, Case	\$	8.65
1 Swiss wrist watch		16.40
1 N.Y. Std. Watch 12 Size		6.28
2 -912 Hamilton Watches		38.20
1 - 12 Size Std. Watch		7.85
1 - 1150 -15 Jewell 18 K. Plat. 5/14 L		35.00
1 -203-16 " 14 K. 10 1/4 L		8.00
1 -703-16 " 14 K. 20c. 8-3/4 L		10.00
2 -201-8 " Filed 10 1/4 L		9.00
1 -203-16 " " 10 1/4 L		5.75
1 -Dia. ring 86 Pt. green gold		350.00
1 -18 J. wrist watch		6.96
1 -18 J. " "		5.96
Cash on hand		378.10
		<u>\$806.03</u>

It was further alleged that the plaintiff had performed and carried out all of the conditions provided for by the policy, and had furnished proof of loss, but that the defendant, though often requested, had refused to pay the above mentioned amount.

On April 6, 1925, the plaintiff filed an affidavit of merits, and on May 26, 1925, an amended affidavit of merits. It was admitted therein that a policy of insurance was issued, but denied that the plaintiff was by robbery deprived of the property mentioned in the statement of claim. Further, it was alleged that the plaintiff had failed and neglected to keep such books and accounts as would enable the defendant to accurately determine any loss the plaintiff might sustain in violation of provision "(f)" as set forth in the policy. The defendant denied that the diamond ring mentioned in the statement

the following information:

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of claim was covered by the policy, and denied that the plaintiff was damaged in any sum.

The evidence showed that the plaintiff opened up a jewelry store at 2642 Lawrence Avenue, Chicago, some time in July, 1924, and on September 22, 1924, took out a policy of burglary insurance in the defendant company; that on October 18, 1924, about 9:30 p. m., while the plaintiff and Mr. Brooks, who had married the plaintiff's niece, were in the store, two men entered, and with guns held them up and ransacked the place, taking with them certain property, for the loss of which the plaintiff brought this suit; that as a part of the property, they took a diamond ring off one of the fingers of the plaintiff.

The evidence of the plaintiff is to the effect that he made out a proof of loss and that it stated accurately the items which were taken as the result of the burglary; that the insurance in question was solicited by one Green, and when the policy was presented, he, the witness, saw that it provided that an active book account should be kept, but he told Green that it was impossible for them to do so at that time, as they had just opened the business; that Green said, "You got your bills;" that he, the witness, told Green that he had ledgers; that Green said, "If I kept my bills and everything on file it was just as good."

At the trial, the question arose as to what items of merchandise and money the defendant was liable for under its policy. The claim of the plaintiff was for the loss of watches and watch cases of the value of \$177.93, of a diamond ring of the value of \$350.00, and

THE COURT, after reading the evidence, said:

The evidence shows that the plaintiff owned no

interest in the property, and that the defendant owned no

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interest in the property, and that the defendant owned no

of \$378.10 cash. The trial judge disallowed the cash item and entered judgment for the value of the watches and watch cases, and the diamond ring. According to the brief of counsel for the plaintiff, no claim is here made for the item of \$378.10 cash. That leaves for consideration the watches and watch cases, and the diamond ring.

The insurance policy contained the following, "The Company shall not be liable for any loss: (f) unless books and accounts are kept by the assured and the loss can be accurately determined therefrom by the Company." It is urged for the defendant that the loss could not be accurately determined by the Company from the books and accounts that were actually kept.

The chief evidence as to the books and accounts that were kept is that of Burgess, a practicing public accountant, who was employed by the defendant on December 1, 1934, to examine the books and accounts of the plaintiff. There is no dispute but that the books which he examined were all those which were possessed by the plaintiff, and in which he undertook to keep some record of his business.

Burgess made an examination, and then reported as of December 1, 1934. In that report he states that he examined (1) General and Miscellaneous Ledger, (2) Watch Repair Book, (3) Optical Prescription Book, (4) Pass Books and Cancelled Bank Checks, and (5) Vendors' Vouchers. The Watch Repair Book contained the name and address of the owner, the check number, the date promised, the movement and movement number, the case and case number,

by whom repaired, amount charged and repairs done. It did not show the time when the watches were taken out. Concerning that account, Burgess reported that as the plaintiff was claiming a loss on merchandise in watches and watch cases only, he took particular pains to ascertain accurately the value of such merchandise unaccounted for on October 19, 1934. Burgess' report states the account of that merchandise as follows:

Purchases August 1, 1934 to October 18, 1934	\$1,569.30
Inventory October 19, 1934,	1,294.84
To be accounted for October 19, 1934	\$ 274.48
Sales August 1, 1934, to October 18, 1934, \$134.50	
Less Element of Profit therein 23.2%	37.97
Unaccounted for October 19, 1934	\$ 177.93

Burgess stated in his report that although no proof was possible that the recorded sales constituted all the sales made, yet, he was "of the belief that the value so expressed in the above determination is as nearly accurate as can be established."

Considering the way in which the watch report book was kept, and the other evidence pertaining to it, we agree with the trial judge that the evidence sufficiently showed that books and accounts were kept in regard to the watches and watch cases so that the loss, as to them, by reason of the robbery could be sufficiently accurately determined by the defendant itself to justify allowance for that item in the sum of \$177.93.

As to the diamond ring, the plaintiff testified that at the time of the robbery he had no record of it in any of his books. When asked if he had any record of the

by when required, amount charged and retained there. It
 did not mean the time when the vehicle was taken out,
 concerning that amount, but that reported that on the
 plaintiff was signing a form on merchandise in vehicle
 and when taken away, he took merchandise back to dealer
 and returned the value of such merchandise unaccounted
 for on October 12, 1934. Defendant reports that the
 amount of that merchandise is as follows:

Merchandise taken from vehicle on October 12, 1934	\$1,500.00
Merchandise returned to dealer on October 12, 1934	1,500.00
Total	\$0.00

Defendant stated in his report that although
 he does not believe that the reported value was
 estimated at the value made, yet, he was not the
 witness that the value as reported in the report
 is an actual value as can be seen.

It is noted that the value of the merchandise
 taken from the vehicle on October 12, 1934, was
 reported as \$1,500.00, and the value of the
 merchandise returned to the dealer on October 12, 1934,
 was reported as \$1,500.00. The net result of this
 is that the value of the merchandise taken from the
 vehicle and returned to the dealer is \$0.00.
 It is further noted that the value of the merchandise
 taken from the vehicle on October 12, 1934, was
 reported as \$1,500.00, and the value of the
 merchandise returned to the dealer on October 12, 1934,
 was reported as \$1,500.00. The net result of this
 is that the value of the merchandise taken from the
 vehicle and returned to the dealer is \$0.00.

ring in his books, he answered, "it was not at that time." He further testified that it was not in the book which the accountant described as the General and Miscellaneous ledger, nor in the Sales Repair Book, but that there was an entry of it in a memorandum book, of old stock, which was made in 1918 or 1919, five years before the robbery, and that that book was in the vault. When asked if the book of account which was called by the accountant a General and Miscellaneous Ledger showed the ring, he answered, "No. It shows it now but did not at that time. We put the ring in afterwards when we completed the invoice." The witness Brooks testified that the robbers, on the night in question, took the ring off of plaintiff's finger; that he had seen the ring in the window and the show case for sale. One Mrs. Johnson testified that she had seen a green gold ring with a white mounting with a diamond setting, a little smaller than acarat, in the store for sale on October 12.

It will be seen, therefore, that at the time of the robbery there was no entry in the books of the business - the books that had been kept since August 1, 1924, when he opened up the business at 2542 Lawrence Avenue - concerning the ring. Burgess, who made the examination for the defendant, testified that he did not see any record of a diamond ring in the books that were submitted to him. Apparently, the only record of the ring at the time of the robbery was that which had been made some five or six years before in a small book which contains a lot of irregular entries, and which the

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plaintiff says was in the vault at the time of the robbery. The first entry in that book is as follows: - "June 1, 1919. In Columbia Safety Deposit Vaults 1-36 K. Diamond Ring Green Gold White Top."

We are of the opinion that we are not justified in overriding the finding of the trial judge that the plaintiff, at the time of the robbery, was possessed, in the store in question, of the diamond ring and that it was merchandise covered by the policy, unless the policy must be interpreted to mean that there can be no recovery if there is no book account of it. There was an entry of it, but that was an old entry in a book that was not in the vault, ~~xxxxxx~~ but did not purport to be an entry in a book that, in any commercial sense, could be considered as "kept by the assured" so that a robbery loss could be ascertained. The very reason for the provision of the policy as to keeping books of the business may be said to involve two elements, first, the accurate finding out of the quantity and quality of the merchandise upon the premises at the time of the robbery, and so prevent honest disputes as to the loss; and, second, to ward off fraudulent claims. Here, the memorandum was not made as a record of this particular business. It was made years before this business came into being. It was not turned over with the books that the plaintiff submitted to Burgees, when the latter was there to make an examination in order to compute the loss. The first time it appeared was at the trial; and even that

plaintiff says that in the trial at the time of the robbery.
The first entry in that book is as follows: - "June 1, 1932.
In Columbia City, against Victim 1-22 R. Edward King.

From that time on."

As one of the objects that we are not justified
in overlooking the finding of the trial judge that the

plaintiff, at the time of the robbery, was concerned in
the state in question, of the amount ring and that is the
circumstances covered by the policy, which the policy was

as indicated by him that there was no recovery if
there is no entry in the book. There was an entry of 12.

but that was an old entry in a book that was not in the vault.
An examination of the old entry was made and it was found that

such that, in any criminal case, would be considered as
proof of the robbery, as that a robbery case could be

concluded. The very reason for the provision of the
policy as to keeping books of the business may be said to

involve two elements, first, the accurate finding out of the
quantity and quality of the merchandise upon the premises

at the time of the robbery, and as to prevent honest dealings
as to the loss; and second, to keep a record of the business

as to the merchandise and not make as a record of the business
business. It was found that this business was into

being. It was found that the books that the
plaintiff submitted to the jury, when the latter was shown

it was in evidence in order to compare the loss. The
fact that it appeared as at the trial, and even that

entry did not give its value. When asked if he had any record of the diamond ring in his books, he answered, "It was not at that time." With the evidence in that condition, it would seem unreasonable to hold that the plaintiff had complied with the requirements of the policy. Niagara Fire Ins. Co. v. Verchand, 189 Ill. 836.

There is no merit in the contention that the defendant through its agent, waived the keeping of books. Even if we assume that the agent said, "You have got your bills, if you keep your bills and everything on file, it is just as good," it does not follow that the plaintiff, as regards the ring, kept any sufficient memoranda of that transaction.

As, therefore, in our opinion the plaintiff was not entitled to recover the \$350.00 for the ring, that amount must be deducted. The judgment, therefore, will be reversed and judgment entered here in favor of the plaintiff and against the defendant in the sum of \$177.25; the plaintiff to pay two thirds and the defendant one third of the costs in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

every day and night the witness. When asked if he had any

recollection of the diamond ring in his pocket, he answered,

"It was not at that time." With the evidence in this

condition, it would seem unnecessary to hold that the

plaintiff had complied with the requirements of the policy.

Insurance Co. v. ..., 111, 200.

There is no merit in the contention that the

defendant, through its agent, waived the hanging on policy.

When it is shown that the agent said, "You have got your

policy, it has been your policy and everything on this, it is

just as good," it does not follow that the plaintiff, as

against the time, kept any sufficient evidence to show

insurance.

It is contended, in our opinion the plaintiff

was not entitled to recover the \$500.00 for the ring, that

the amount was not collected. The judgment, therefore, will be

reversed and judgment entered here in favor of the plaintiff

and against the defendant in the sum of \$177.50; the plain-

tiff to pay her costs and the defendant one-third of the

costs of this appeal.

Reversed and judgment entered in favor of the plaintiff.

181-30442

JOSEPH KROPIDLOWSKI,
Appellee,

vs.

FRANK URNIAZ and KAZIMER URNIAZ,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

241 I.A. 609

Opinion filed March 10, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 2, 1925, the plaintiff, Joseph Kropidowski, filed a complaint in forcible detainer in the Municipal Court, claiming that he was entitled to possession of the following property: "The entire one room on the main floor and coal shed in the rear" of the premises known as 1650 West 48th Street, and alleging that the defendants, Frank Urniaz and Kazimer Urniaz, were unlawfully withholding from him the possession thereof.

The defendants were duly served; there was a trial before the court, without a jury, and on April 8, 1925, the court found that the defendants were guilty of unlawfully withholding from the plaintiff possession of the premises, and that the right to possession was in the plaintiff. This appeal is from that judgment.

The evidence was practically all agreed upon. There was a written lease offered in evidence, which was dated April 1, 1920, and covered the term from April 1, 1920 to April 1, 1927. The rent therefor was \$588.00 for the term, payable in monthly sums of \$8.00, "on the first

606 A.I. 142

Opinion filed March 10, 1986.

day of each month in advance." It was admitted that the lease in question had been assigned to the plaintiff and that the defendants had attorned to the plaintiff prior to March 1, 1935. The rent due on March 1, 1935 was not paid by the defendants on that date. On March 3, 1935, the plaintiff served the defendants with a written notice merely demanding "immediate possession" of the premises. On that same day, but subsequent to the service of the notice, the defendants tendered to the plaintiff a check for \$8.00 for the rent for that month; which was refused.

The question arises whether any demand for rent or notice was necessary in order to entitle the plaintiff to institute these proceedings in forcible detainer. The lease provides, "that if default shall be made in the payment of the rent * * * it shall be lawful for the party of the first part (the lessor) to enter into and upon said premises * * * either with or without process of law, to re-enter and re-possess the same, and to distrain for any rent that may be due thereon, at the election of said party of the first part; and in order to enforce a forfeiture for non-payment of rent, it shall not be necessary to make a demand on the same day the rent shall become due, but a demand and refusal or failure to pay at any time on the same day, or at any time on any subsequent day, shall be sufficient; and after such default shall be made" the lessees shall be deemed guilty "of a forcible detainer of said premises under the statute."

The trial judge, interpreting the just mentioned

...of such matter in evidence. It was stated that the
...in question had been assigned to the plaintiff and
...the defendant had returned to the plaintiff upon the
...1933. The court on March 1, 1933 was not able
...by the defendant on that date, on March 2, 1933, the
...plaintiff served the defendant with a writ of habeas corpus
...returning "immediate possession" of the premises. On
...that same day, but subsequent to the service of the writ,
...the defendant removed to the plaintiff a check for \$2.00
...for the rent for that month; which was refused.
...The question arises whether any damage for rent
...is recoverable in order to entitle the plaintiff
...to institute these proceedings in tortious damages. The
...issue arises, "that it should be made in the case
...that the rent is to be paid to the plaintiff and not to
...the third party (the defendant) to whom it was paid."
...The court in the case of *Smith v. Smith*, 100 Cal. 221, 34
...P. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

provision of the lease, held that the defendants were in default because of their "failure to pay" the rent when it was due, and that suit would lie without a demand for rent.

The provision that if the rent is in default it shall be lawful for the landlord to enter with or without process of law, is not here involved. The plaintiff did not undertake to reenter and repossess, he brought suit under the statute for forcible entry and detainer. That provision gave him a license to reenter in case of default. Under that, if he had entered without force, he would have been within his rights.

Singree v. Jones, 80 Ill. 177. The question then remains whether the evidence showed that the landlord was entitled to sue in forcible entry and detainer "to enforce a forfeiture for non-payment of rent." To have that right it is provided that "it shall not be necessary to make a demand on the same day the rent shall become due." But it is also provided that "a demand and refusal or failure to pay at any time on the same day, or at any time on any subsequent day, shall be sufficient." Those two clauses pertain only to the subject of a demand. The words imply that a demand is necessary, and provide when it may be made; they pertain only to the time and not to the grounds upon which the demand may be based. The use of the words "or failure to pay" have reference, therefore, only to a failure to pay on demand. The evidence shows that a demand was made, but it was for possession and not for

new edition of the paper, said that the defendant was
in default of their "failure to pay" the rent
when it was due, and that would result in a

forfeiture of the

The provision that if the rent is in default
it shall be lawful for the landlord to enter upon the
premises of the tenant, is not hereby amended. The

provision that if the rent is in default
the landlord may enter upon the premises of the tenant
and remove the same, is hereby amended so that the
landlord shall be liable to pay the tenant the value
of the same, if he has entered upon the premises
of the tenant without notice.

Section 14, Chapter 147, of the Statutes of this State

relating to the evidence that the landlord was
entitled to use in the case of a tenant's failure to
pay the rent, is hereby amended so that it shall read
"it is provided that it shall not be necessary to show
that on the same day the rent shall become due." and it
is also provided that a demand and refusal or failure to
pay it at any time on the same day, or at any time on any day
within six months, shall be sufficient." These two sections
are hereby amended so that they shall read "it is provided
that a demand for payment of the rent shall be made at or
before the time when the rent becomes due, and if the rent is
not paid at that time, the landlord may enter upon the premises
of the tenant and remove the same, and the tenant shall be
liable to pay the landlord the value of the same, if he has
entered upon the premises of the tenant without notice."

rent, and so was insufficient. No demand for rent having been made prior to suit, it follows that the suit was premature. Cases have been cited, such as Carlson v. Levinson, 328 Ill. App. 104, Strome v. Forgharclari, 147 Ill. App. 18, and Clark v. Stevens, 221 Ill. App. 233, but in each of these cases the right to notice or demand was expressly waived.

As to the alleged error in refusing to permit the defendant to put in evidence as to the times at which rent had formerly been paid - assuming the offer was made in apt time - the law is that a tenant is entitled to show that delayed payments have been acquiesced in for such a period of time as to justify holding that strict compliance has been waived. Bernstein v. Bernstein, 220 Ill. App. 222, Ronovan v. Murphy, 217 Ill. App. 31.

Inasmuch, therefore, as the evidence shows that no demand for rent was made, the judgment will be reversed.

REVERSED.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

151 The system is composed of 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916,

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10. *Other* _____

Revised: 10/1/00

208-10400

R. LAPINS, M. LAPINS, WILL LAPINS
and J. LAPINS, co-partners trading as
M. LAPINS & SONS,

Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,

Appellees.

241 I.A. 609

APPEAL FROM

MUNICIPAL

COURT OF

CHICAGO.

Opinion filed March 10, 1926.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On April 12, 1923, the plaintiff, M. LAPINS & SONS,
filed a statement of claim in a fourth class case in the
Municipal Court, charging that the defendant, Louisville
& Nashville Railroad Company, was liable for damages in
the sum of \$295.35 for negligence in the transportation
of two shipments of strawberries from Somers, Tennessee
to Chicago. The defendant was served with summons on
April 12, 1923, and on April 18 filed its appearance,
together with a demand for a jury trial.

On April 19, 1923, on motion of the defendant,
it was ordered that the time for the defendant to file
an affidavit of merits be extended thirty days, and on
May 14, 1923, that time was extended to June 28, 1923.
On June 15, 1923, the defendant filed an affidavit of
merits alleging that the merchandise was properly cared
for and transported and delivered within a reasonable
time, and that if it was in a damaged condition when
delivered it was due to the fault or delay of the shipper
handling and loading, or to a defective and diseased

condition of the strawberries at the time of the shipment, or to other causes not within the control of the defendant, or any connecting carrier; further, that the strawberries were at the time of shipment overripe, soft and small in size, and of poor quality.

On June 8, 1935, the cause coming on in regular course for trial, and the plaintiff, called in open court, failing to appear, it was ordered, for want of prosecution, that the plaintiff be non-suited, the cause dismissed, and that the defendant have judgment, as in the case of a non-suit, and for its costs.

On June 9, 1935, a motion was made on behalf of the plaintiff to vacate the order of dismissal of June 8, 1935, and the court "being fully advised in the premises," overruled the motion. This appeal is from that order.

The Bill of Exceptions shows that in support of the motion to vacate the order of June 8, 1935, dismissing the cause for want of prosecution, three affidavits were filed, one by Bertha Brody and two by H. E. Lust, attorney for the plaintiff.

The affidavit of Bertha Brody recites that she is a clerk in the office of Lust, attorney for the plaintiff; that on June 8 she appeared before Judge Lupe, and requested a continuance, on the ground that a witness, Will Lapidus, was out of town; that Lee Frank, attorney for the defendant, objected and demanded that an affidavit for continuance be filed; that Judge Lupe

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stated that he would hold the case until the affidavit was drawn; that she immediately hurried back to the office, arriving there at 12:10 a. m., and notified Lust; that he immediately dictated to her an affidavit, swore to it, and "left for court, to her knowledge, at 11 o'clock, just as soon as the affidavit was signed;" that said Lee Frank stated that "he would wait in court until the affidavit was brought over so that he could ascertain whether he desired to admit the facts in the case and go to trial."

The first affidavit of Lust recites that he is attorney for the plaintiff; that at a quarter after ten on June 8, his clerk, Bertha Brody, notified him that Lee Frank, attorney for defendant, insisted on an affidavit being filed for continuance of the case; that he, Lust, immediately drew up an affidavit, and as soon as it had been written up, signed it, and went over to court, arriving there at 11:05 a. m., June 8, and found that the case had already been dismissed for want of prosecution; that the plaintiff has a good and meritorious case; that he, Lust, was represented in court when the case was first called, and had understood that the case would be held on the call until the affidavit for continuance was presented.

The second affidavit of Lust recites that he has knowledge of the facts; that Will Lepidus is a necessary witness, but is not in the City of Chicago at the present time, but is traveling on business in the State of Georgia, and if he were present he would

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testify that he inspected the shipment of strawberries in Car C. W. 51619, while the same were being loaded on May 15, 1932, at Pomona, Tennessee; that they were in good merchantable condition at that time, fit for shipment; that the railroad did not place the car for loading until nine hours after it was ordered; although the usual and customary time is two hours; that if Will Lapidus were present he would testify that he inspected car C. W. 95615; that he inspected the strawberries in that car on May 16, 1932 at the time they were being loaded into the said car at Pomona, and that they were at that time in good merchantable condition; that one H. B. Briggs is a necessary witness; that he is an expert on the construction and uses of refrigerator cars such as were used in this case; that he is at present in California, but if present would testify that the specifications of the United States Standard Refrigerator Car consist of insulation of two inches of hair-felt in the sides and ends, and two and a half to three inches of hair-felt in the roof, and two inches of cork in the floors, with basket bunkers and insulated bulkheads and floor racks; that such specifications are considered proper and necessary for the safe transportation of perishables; that the cars involved in this suit did not conform to such specifications and were imperfect, inadequate and defective, as far as carrying perishable produce is concerned.

A supplemental transcript of the record shows

The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. The second is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. The third is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States.

a certain memorandum, commonly called a half sheet, and upon that the following postponements are shown:

Apr. 19, 1923, by Judge O'Connell, to May 23, 1923;
 May 14, 1923, Judge O'Connell, to June 29, 1923;
 June 23, 1923, Judge Adams, postponed to next Jury Calendar;
 Oct. 23, 1924, Judge Trude, to Dec. 9, 1924;
 Dec. 9, 1924, Judge Trude, "Plff. Feb. 13, 1925, final;"
 Feb. 19, 1925, Judge Lupe, to Apr. 2, 1925, final;
 Apr. 2, 1925, Judge Lupe, to June 8, 1925, final;
 June 8, 1925, Judge Lupe, "Dec. & Afft. fld."

The half sheet also shows that two sets of depositions have been taken, one set being opened on March 7, 1924, and the other on April 27, 1925.

The Bill of Exceptions contains no record of what transpired before the trial judge on June 8, but the common law record shows the order of that date, and that recites that the cause coming on in regular course for trial, on motion of the defendant, "the plaintiffs, though called in open court, came not, and fail to prosecute this suit," and for want of prosecution it is ordered that the plaintiff be non-suited and that the "suit be and it hereby is dismissed out of this court." Opposed to that is the affidavit of Brody that on that occasion she appeared before the court and requested a continuance on the ground that a certain witness was out of town and that upon the attorney for the defendant demanding an affidavit to base a continuance upon, the trial judge said "he would hold the case until the affidavit was drawn." Not only does the bill of exceptions, as stated above, fail to recite what, it is charged in the affidavit of Brody, the trial judge said on June 8, but,

also, it does not show what, if anything, transpired on June 9. But the order of June 9 recites that as to the plaintiff's motion "to vacate the order of dismissal of June 8, 1925, the Court being fully advised in the premises, overrules said motion." The result is, the record shows that on June 9 the trial judge, who must be presumed to have known what transpired before him on June 8, was of the opinion, after considering the affidavits of Brody and Lust, that the motion should be overruled. In the face of that, we are not justified in concluding that his judgment was wrong. We assume that the trial judge acted fairly and justly in the matter, and that after considering the contents of the affidavits, in conjunction with his personal knowledge of what transpired before him on June 8, he was of the opinion that the motion should be overruled. Without a record of what took place on June 8, we are unable to say that what did take place was not sufficient to justify the trial judge in refusing to allow the motion to vacate the order of dismissal.

Moreover, the affidavits are clearly insufficient, in that they do not set up sufficient facts showing diligence, and that a reasonable effort was made to have the witnesses present when the case was called for trial.

The Quincy Whig Co. v. Tillson, 67 Ill. 351.

The judgment will be affirmed.

AFFIRMED.

THOMSON, P. J. AND O'CONNOR, J. CONCUR.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILL.
JAN. 10, 1911.

DEAR MR. BROWN:

I have just received your letter of the 7th inst. and am glad to hear that you are still interested in the study of the history of the United States. I am sure that your work will be of great value to the country.

I am, very respectfully,
Yours truly,
J. M. Smith

JACOB JARLOWSKI,
Plaintiff in Error,

v.

SWIFT & COMPANY,
a corporation,
Defendant in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 610

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an action on the case to recover damages for alleged wilful violations of the Occupational Disease Act. (Cahill's Stat. 1925, Ch. 48, Par. 185, et seq.) The declaration consists of an original count and five additional counts. We shall refer to them as numbers 1 to 6, inclusive. To each were filed a general demurrer and special demurrers, which were sustained. Plaintiff, abiding by his pleadings, brings the case here for review.

The first, second, third and fifth paragraphs of each of the counts are the same.

The first paragraph alleges that defendant was carrying on what is commonly known as a meat packing business, including work and process of making, drying, washing and cutting of soap, and that such work and process might produce disease peculiar and incident thereto, to which defendant's employees engaged therein were subject and exposed, and to which employees in other lines of business are not ordinarily exposed.

The second paragraph alleges that plaintiff was employed by defendant in the work of cutting soap and wiping out soap, and in that employment he and other employees were required to put their hands in certain solutions of alcohol and of salt, vinegar

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and water and came in contact with poisonous agencies, fluids, salts, drugs and other agencies, and that such work and process were likely and liable to produce illness and disease peculiar thereto, especially diseases of the skin and of the hands and arms and other parts of the body exposed to the enumerated poisonous agencies, etc., and that said work and process subjected them to the dangers of illness and disease incident thereto.

The third paragraph undertakes to set up a violation of the statutory duty of defendant to adopt and provide reasonable and approved devices, means and methods for the prevention of such occupational disease as was incident to such work and process. It avers that defendant wilfully violated and failed to comply with section 1 of the Occupational Disease Act in that it neglected and failed to provide any reasonable devices, means or methods whatever for the prevention of said industrial and occupational disease, incident to the work, process, etc., to-wit, the disease caused by mineral poisons, by wood alcohol, vinegar, salt and like solutions, and that it was practicable for defendant to have adopted and provided such means, etc., as would have prevented such diseases incident to the work.

The fifth and last paragraph sets up in substance that by reason of such employment and as the proximate result of the wilful violation of the act plaintiff became affected and seized with "a certain industrial or occupational disease, incident to said work," to-wit, a disease caused by being obliged to expose the hands constantly to such solutions, and as a result thereof he was "poisoned and became sick, and his hands stiffened and crippled, and the skin of his hands was sore and diseased, etc."

The fourth paragraph to counts 1 and 2 charges failure and neglect to provide for the employees (including plaintiff) proper clothing, to-wit, "gloves or other proper covering for the

hands and arms," and to cause such employees to be examined by a competent licensed physician as often as once each calendar month, and to provide and maintain adequate devices for protecting the hands and arms and bodies of such employees, and to put in a conspicuous place in the plant proper notices of the known dangers to the health of the employees therein, arising from such work and process, and simple instructions as to any known means of avoiding the injuries and consequences thereof, and to post in certain rooms any such notice whatever.

Count 2 is identical with count 1 except that it contains additional allegations of a decision and finding of an arbitrator of the industrial commission in a hearing before him between the same parties as in the instant case, to the effect that the injury complained of is the result not of an accidental injury, as that term is used in the title of the Workmen's Compensation Act, but is the result of an occupational disease; that that decision was not appealed from and became final.

Count 3 is identical with count 1 except that in paragraph 4 before setting forth the specific respects in which plaintiff charges in that paragraph failure to comply with the act it alleges in general language a failure to provide "reasonable and approved devices, means and methods for the prevention of such industrial and occupational diseases as were incident to such work and process * * * ."

Count 4 is identical with count 3 except that it incorporates the same allegations as to the arbitrator's decision and finding as in count 2.

Count 5 is identical with count 1 except that it omits paragraph 4.

Count 6 is identical with count 1 except that it

2. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1910:

[illegible]

— 100 —

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

The State has not publicly admitted anyone is allowed to

gallons of water available to the community.

The interest rate on government bonds, r , is set by the central bank.

• *Journal of the American Medical Association*, 1997; 277: 1001-1005.

REPORT OF THE BOARD OF DIRECTORS OF THE UNIVERSITY OF CALIFORNIA FOR THE YEAR 1900

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Figure 10-16

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THE UNIVERSITY OF CHICAGO PRESS

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1944-1945

J. Polym. Sci. Part A: Polym. Chem.

Approved for release by NSA on 08-28-2014 pursuant to E.O. 13526

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SECRET

Source: *Journal of the American Statistical Association*, 1990, 85, 103-112.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

DECLASSIFICATION AUTHORITY: 25 USC 552, 5 USC 552, 44 USC 34, 50 USC 3024

1. The first step is to identify the problem or question that needs to be answered.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1941-1942

U.S. GOVERNMENT PRINTING OFFICE: 1967

omits paragraph 4 and in its place charges failure to post notices only.

The special grounds of demurrer were that no facts are set forth giving rise to a duty to have plaintiff examined by a physician, or to post notices of known dangers, etc., or to provide proper working clothing or gloves, as alleged, and that the alleged violations of the act are violations of section 2 of the act which is not applicable to plaintiff's occupation; that the averments are vague, indefinite and uncertain, failing to set out in what manner plaintiff was doing the work to produce an occupational disease; that the decision rendered by the arbitrator referred to is immaterial, impertinent and scandalous, having no bearing upon the issues of the cause, and should be stricken; and the various allegations are merely conclusions of the pleader.

Even if the several counts were defective in form and might be questioned on any of the grounds of special demurrer, yet it was improper to sustain the general demurrer which stated in substance a cause of action based upon the first section of the occupational act. The several elements of a cause of action under said section are stated in each count, viz., that the work or process carried on by defendant as such employer was such as "may produce any illness or disease peculiar to the work or process," and such as "subjects the employee to the danger of illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment," and that the employer did not adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process, and that plaintiff, as its employee, contracted such disease from and while engaged in such employment.

But the special demurrer to the allegations pertaining to

number one of student groups study at the University of Iowa

The medical grounds of exemption were that as these are not legal things in a state to have validity emanated by a physician, or in great measure at least danger, etc., on the ground proper working system or system, no allowed, and that the alleged violations of the act are violations of section 2 of the act which is not applicable to the act's operation; that the government has power, authority and discretion, failing to act in what is plainest was doing the work to produce an occupational disease; that the decision rendered by the arbitrator referred to is fundamental, important and scandalous, having no bearing upon the issues of the case, and should be reversed; and the various

[illegible]

the finding of an arbitrator of the industrial commission was properly sustained. That proceeding was evidently had under an amendment of July, 1921, to section 15 of said act, (Hurd's Ill. R. S. 1921, p. 1572) which provided that disablement of an employe engaged in occupations covered by section 2 of the act shall be treated as an accidental injury within the terms of the Workmen's Compensation Act, and be subject to its provisions for compensation. That amendment was held to be unconstitutional in Kelley v. St. Louis Smelting Co., 307 Ill. 367. In view of that holding the industrial board had no jurisdiction to decide that the disease in question was an occupational disease and hence its decision or finding could not be pleaded as res judicata, as was the effect of such allegations. (Duke v. Huenkemeier, 289 Ill. 148.)

Because the act cannot be, and in fact is not, predicated on section 2 of the act, which only purports to cover those employments which require the using and handling of a variety of lead preparations, and where brass is manufactured or lead or zinc is smelted, in which industries the act requires employers to provide for the benefit of the employes proper working clothes, appellee urges that it was improper to allege a failure on the part of the employer to provide proper working clothes or gloves, and medical examinations of the employes, as specifically required in employments covered by section 2. We cannot say as a matter of law that proper clothing or gloves, or such examinations by physicians do not come within the scope of the provision of section 1 that the employer shall adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to the work or process covered by that section. In other words, the averment presents a question of fact on which issue may properly be taken for determination by a jury. The fact that these are distinct

The finding of an employer of the industrial establishment was
purposely sustained. That proceeding was evidently had under an
amendment of July, 1933, to section 10 of said act. (Mich. 111,
L. S. 1933, p. 137) which provided that disbursement of an
employee engaged in occupations covered by section 3 of the act
shall be treated as an accidental injury within the terms of the
act, and he subject to the provisions for
compensation. That amendment was held to be unconstitutional in
Michigan's Compensation Act, 207 Mich. 287, in view of the
fact that the industrial board was not authorized to make such
the amount in question was an occupational disease and hence the
disbursement of benefit will not be treated as an occupational
disease of any kind. (Mich. 111,
L. S. 1933, p. 137)

Because the act cannot be, and in fact is not, retroactive
on section 3 of the act, which only purports to cover those employ-
ments which require the raising and handling of a variety of loads
or materials, and where there is a substantial risk of injury in
such work, in which instance the act would require the employer
to the benefit of the employee system within certain limits, and
also that it was intended to provide a benefit to the employee
employer to provide proper medical aid, and medical
examination of the employee, as specifically provided in section
10 of the act. It cannot be a matter of fact that
system of benefit, or such limitation by legislation is
not and shall the scope of the provision of section 1 that the
employer shall report and provide medical aid and approved device,
means or methods for the prevention of such injuries or
occupational diseases as are known to the state or persons
covered by this act. In other words, the economic process
a condition of fact on which laws are enacted.

requirements in employments covered by section 2 does not necessarily exclude the claim that each is a reasonable and approved means or method for the prevention of such occupational diseases as it is contemplated to guard against under section 1 of the act. (Dandurand v. Hydrex Co., 222 Ill. App. 267.) We cannot say as a matter of law that a disease peculiar and incident to making and drying and cutting of soap may not be prevented by the use of gloves or other clothing or by timely examination by physicians. The burden, however, would be on plaintiff to show that these were reasonable and approved methods, etc., to prevent such diseases.

As to the averments to post notices, we think it sufficient to say that the requirement therefor provided for by section 13 of the act is for the benefit of employees engaged in any work or process covered by the provisions of the act. The claim that this allegation is repugnant to the special demurrers because the declaration does not directly allege that the dangers sought to be avoided by posting such notices were "known," is of doubtful force. It, perhaps, would have been better pleading to have so alleged. But if, as alleged in the declaration, the disease was one peculiar and incident to that particular line of employment it was presumptively a known danger such as the act seeks to prevent by, among other things, requiring such a notice to be posted. The duties cast upon an employer by the act to exercise precautions against contracting a disease by his employees that is peculiar or incident to the employment naturally requires him to ascertain and know whether it is a disease peculiar and incident to such employment. The duty to provide against it would hardly arise unless the disease was known to exist. That the disease in question was known is sufficiently implied, we think, so as to require such a notice, from the positive averment that it was incident and peculiar to such work.

Nor do we think, as claimed by appellee, it is necessary

[illegible]

to name the disease, - if it had a name - so long as its character or nature may be known or inferred by such results as were described in the declaration.

Neither do we think that in the absence of an averment that the solutions mentioned in the declaration were poisonous or dangerous per se when applied externally, the averment that they were poisonous was a pure conclusion of the pleader. The averment that they were poisonous or dangerous is an allegation of fact. True, the pleader must state facts from which the law will raise a duty, but we think the declaration was not insufficient in this respect.

appellée's argument that the declaration cannot be successfully traversed unless each allegation of fact is specifically denied, thus compelling defendant to allege that it did provide proper clothing and medical examination, is without merit. Defendant might well admit such allegations and still be able to show that under the particular circumstances of the case such requirements are not reasonable or approved devices, methods or means of prevention. Such a position could unquestionably be taken under a plea of general issue. Equally untenable is defendant's contention that if it were forced to go to trial on the declaration as it stands it would be deprived of its right to a trial before a jury on the questions of fact that arise under section 1.

While, therefore, we think the court properly sustained the special demurrer to counts 2 and 4 pleading res judicata as aforesaid, yet we think the court improperly sustained the demurrers on other grounds.

Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

to know the answer, - it is not a man - as long as his character
of course may be known or inferred by such means as were
described in the declaration.
Neither do we think that in the absence of an agreement that
the statements mentioned in the declaration were poisonous or dangerous
and not as often applied externally, the agreement that they were
poisonous was a bare conclusion of the finder. The agreement that
they were poisonous or dangerous is an allegation of fact. True,
the finder must state from which the law will arise a duty,
but we think the declaration was not insufficient in this respect.
Appellee's argument that the declaration cannot be sustained
being traversed unless each allegation of fact is specifically denied,
was overruled because in doing that it is the duty of the
finding and medical examination, in almost every case, defendant might
well easily deny all charges and still be able to show that the
particular statements if the law were otherwise, but not
responsible for repeated injuries, without at least a few of general
a position would representatively be taken under a plea of general
denial. Similarly, it is inadvisable to contend that it is
proper to go so far as the declaration as it stands it would be
deprived of its effect in a trial before a jury in the absence of
that fact alone under section 1.
While, therefore, we think the court correctly decided the
special questions in cases 2 and 3, the finding in case
1, and we think the court improperly sustained the verdict
in case 4.
Accordingly the judgment will be reversed and the
cases remanded.
Dated at St. Paul, Minn., January 11, 1907.

FRED R. SCHMIDT,
Appellant,
v.
CHARLES AUGUST et al.,
Appellees.

402
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

241 I.A. 610

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant filed his bill in equity to establish his ownership in 27½ shares of the common stock of the Charles August Corporation, and to enjoin Charles August from transferring or disposing of the same, and to require him to account for dividends he had received. The master found said August holds said common stock for complainant under and by virtue of an oral agreement entered into in February, 1922, between complainant and defendant August, and one Kurth, one of the stockholders and directors of the Charles August Corporation, and that he should be required to deliver the same, with \$275 of dividends collected by him. The chancellor sustained the exceptions to the master's report, and dismissed the bill for want of equity. Complainant appeals.

The Charles August Corporation was chartered in December, 1919, with an authorized capital stock of 250 shares of preferred, of the par value of \$100 each, and 250 shares of no par value common stock. The preferred stock was never issued. Subsequent proceedings by the board of directors indicated the purpose to have the capitalization of \$25,000 represented by the common stock. Pursuant to a previous understanding between the three incorporators, August, Schmidt and Kurth, August subscribed for 248 shares and Kurth and complainant Schmidt for 1 share each of the common stock. The object of the corporation was to manufacture and

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Source: U.S. Census Bureau, 1990. *U.S. Census of Population and Housing, 1990, Summary of Selected Characteristics, Washington, D.C., 1992.*

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4. *Unemployment in the United States* by J. Edgar Hoover, Director, Federal Bureau of Investigation, U.S. Department of Justice, 1932, 128 pp., \$1.00.

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...the government of the United States...

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deal in inks, a business in which August had been employed for some years, and by reason of his experience and knowledge thereof he was to be the active party in organizing the corporation and managing its business. Pursuant thereto he proceeded, before it was fully organized, to rent premises and purchase machinery for conducting the business, paying therefor out of his own bank account. He was subsequently reimbursed therefor on the books of the company and in the distribution of the common stock.

It seems to have been the understanding that the 250 shares of common stock should at first be paid for at the minimum statutory price of \$5 per share. August's bank account being insufficient to meet all of the preliminary expenses and pay \$1250 for the common stock he asked Schmidt who was to contribute \$2500 toward the enterprise, to give him a check for \$1500 to complete the organization. Schmidt gave the check and he deposited it in his bank account, and drew his own check for \$1250 in payment of the subscriptions for the common stock. It appears in the minutes of the first meeting of the board of directors, held December 30, 1919, that such valuation of the common stock was determined upon as a matter of convenience for organization only and not as the prospective or real valuation to be put upon the same, which they evidently contemplated should be \$100 per share instead of issuing preferred stock. This understanding was confirmed by subsequent action of the board of directors, which was composed of said three stockholders. At that meeting Schmidt reported "that in accordance with arrangements made with August and Earth he had an equitable interest in twenty-five (25) shares of the stock subscribed for by the incorporators, that he had already paid for this stock and that he was prepared to and did make additional payments to the incorporators by way of cash or credits with a view of paying into the treasury of the corporation, to be considered as surplus the sum of two thousand three hundred

that in 1901, a business in which money had been employed for
some years, and by reason of his experience and knowledge thereof
he was to be the active party in organizing the corporation and
conducting the business. It was thereupon he proceeded, before it
was fully organized, he sent someone and purchased machinery for
conducting the business, paying therefor out of his own bank
account. He was subsequently reimbursed therefor by the books of
the company and in the distribution of the common stock.
It seems to have been the understanding that the 250
shares of common stock should be held for at the minimum
amount of \$250,000, and that the bank account being
reimbursed to meet all of the preliminary expenses and pay
for the common stock he asked Schmidt who was an expert
to have the corporation, to have him a check for \$250,000
made out to Schmidt. Schmidt gave the check and he deposited
it in his bank account, and then he was told to go
and get the common stock for the common stock. It appears in
the records of the first meeting of the board of directors, that
Schmidt, No. 1010, that with valuation of the common stock was
determined upon as a matter of convenience for organization only
and not as the representative of real valuation to be put upon the
stock, that the company was organized should be \$250,000 per share
and that the company should be \$250,000 per share. This understanding was
fixed by agreement of the board of directors, which was
expressed at said first meeting. At that meeting Schmidt
expressed that in accordance with arrangements made with Schmidt
and that he had an equitable interest in twenty-five (25) shares
of the stock authorized by the corporation, 250,000 shares
and that the stock was to be paid for by the corporation and the
same would be paid for by the corporation, and that the stock
should be paid for by the corporation, and that the stock

and seventy-five (\$2375) dollars;" and it also appears in the minutes of the meeting that he made a statement that "the corporation was to issue twenty-five (25) shares of common stock without par value to his order as soon as the necessary payments or adjustments had been made on the books of this corporation." Mr. August reported at the same meeting that he was "prepared to pay in as surplus to the corporation additional payments in property, intangible or otherwise, and credits to be considered as paid in surplus by the corporation." After referring to his wide experience in the business, the value of the use of his name to the corporation, and of his formulae and secret processes for the manufacture of ink, and his preliminary expenditures, he submitted an itemized valuation thereof aggregating \$11,600, which he desired the corporation to appraise and consider "as a paid in surplus of 126 shares of the common stock." A resolution was adopted accepting the offer and authorizing the officers "to carefully go into the value of the additional assets" to be turned over to the corporation by said August, "and to have the books made up accordingly."

On January 2, 1920, August addressed a letter to the officers of the corporation saying that he was entitled to have issued to his order 246 shares of the common stock, and ordered them issued as follows: 20 shares to said Schmidt, 17 to said Kurth, and 202 to himself. This seems to have been in accordance with the understanding expressed by Schmidt at said meeting whereby he was to have 25 shares for which he had arranged to and did contribute \$2500, and got a bonus of 5 shares, thus giving him 30 shares, including the 1 he subscribed for. Evidently to carry out the intention that the contributions should be on the basis of \$100 per share August, at a meeting held January 6, 1920, reported that rather than attempt to sell preferred stock for additional working capital he was willing to retain for him

self only 126 shares of the common stock and to assign 76 shares that he then held to be sold and the proceeds to be considered as paid in surplus, and he would relinquish all his rights thereto. A resolution to accept that offer was passed, and the 76 shares were turned into the treasury to be sold. The "additional assets" contributed by him at a valuation of \$11,600, together with \$1000 cash, he paid in, paid for 126 shares at \$100 per share.

At the annual meeting of the board of directors on January 19, 1921, a resolution was passed that the payments in excess of \$1250, amounting to \$19,750, which were itemized and shown as capital surplus on the statement at the close of business December 31, 1920, be designated as "appropriated surplus with the idea in view that for all purposes the same to be considered as capital of the corporation and under no circumstances available for distribution as dividends."

The minutes of all these meetings were signed by each of the directors, including Schmidt. They purport to show an understanding and agreement between the incorporators that their relative shares of stock should be as stated in the minutes and paid for as therein stated on the basis of \$100 per share, and that the so-called "surplus" should be deemed payment towards the capitalization of \$25,000 to be represented by the 250 shares of common stock. Towards this there was paid in cash \$2,500 by Schmidt, \$1,000 by August, and \$500 by Kurth. The rest of the capitalization seems to have been made up of good will and preliminary expenditures. This "good will" was recognized as represented by the 5 additional shares issued to Schmidt, 10 issued to Kurth, and 110 to August, for which the board of directors accepted his secret processes, etc., at \$10,000, and his list of customers at \$1,000 at said first meeting of the directors.

At a meeting of the board of directors held January 2,

1920, August, the president of the corporation, who seems to have attended to the business of the corporation, was voted a salary of \$10,000 a year, and Kurth, the secretary, who seems to have rendered no service except bookkeeping in the evenings, was voted a salary of \$2,500 a year, and Schmidt, who rendered no service, was voted a salary of \$100 a year as treasurer.

The minutes of the annual meeting of the stockholders held January 19, 1921, show as present, the three stockholders, August, representing 126 shares of the common stock, Schmidt 30 and Kurth 18, and that a resolution was passed that all the acts and proceedings of the directors and officers shown by the books and records of the corporation be approved and ratified, and that August and Kurth relinquished a part of their salaries voted at the beginning of the year. These same stockholders were present at the next annual meeting representing respectively the same number of shares of stock.

About the time of the January meeting, 1922, a discussion was had with reference to a division of dividends among the three stockholders on what was termed "good will stock," represented as aforesaid. August being apparently willing to allow Schmidt and Kurth to collect dividends on a portion of his 110 shares, it was orally agreed between them that a contract was to be prepared and submitted to August for his examination and signature. This was done and signed by Schmidt and Kurth. August refused to sign it, claiming it was not in accordance with the verbal arrangement, and thereupon this bill was filed, which seeks the enforcement of an oral agreement for a division and accounting of dividends to the effect that while August was to hold said 110 shares in his own name, Kurth was to be the equitable owner of 22½ and Schmidt of 27½ shares of the 110 shares of stock held by August as trustee, and that the dividends thereon were to be paid to August for their accounts, respectively. The master's finding was based on the

1900, August, the president of the corporation, who was then
and attended to the business of the corporation, was voted a
salary of \$20,000 a year, and March, the same day, was voted
to have rendered no service except bookkeeping in the evening,
was voted a salary of \$2,500 a year, and December, the corporation
a dividend, was voted a salary of \$200 a year as treasurer.
The minutes of the annual meeting of the corporation
held January 15, 1901, show on page 1, the three stockholders,
namely, representing 100 shares of the common stock, Robert H.
and March 15, and that a resolution was passed that all the
books and proceedings of the corporation and all laws shown by the
books and records of the corporation be approved and ratified,
and that Robert and March relinquished a part of their interest
in the corporation at the beginning of the year, their own stockholders
were present at the next annual meeting representing respectively
the same number of shares of stock.

About the time of the January meeting, 1901, a discussion
was had with reference to a division of dividends among the three
stockholders on what was termed "good will stock," represented
by the stock. It was decided that the stockholders should be
paid in cash as follows: Robert H. \$10,000, March 15, \$10,000,
and the stockholders should have that a contract was to be prepared
and executed in regard to the stockholders and the stock. This
contract was signed by Robert H. and March 15, and was filed in the
minutes of the corporation. It was not in accordance with the usual
and proper way of dividing dividends, which would be the payment of
the stockholders for a division and accounting of dividends to
the stockholders who agreed to have paid 100 shares in his
own name, which was to be the capital stock of the corporation.

At the time of the last annual meeting of stock held by Robert H. and March 15,
and that the corporation should have to be paid to Robert H. and March 15

validity of the oral agreement. Although his report states that the evidence is very conflicting, and that the facts tend to show that Schmidt by his own acts in the meetings of directors and stockholders is estopped from urging the claim set up in the bill, and, in fact, appellant admits in his brief that on their face the minutes of said meetings tend to show that he is estopped from urging the claim set up in the bill, ^{he urges} that the above stated facts establish a resulting trust. The prayer of the bill is that August be decreed to turn over to Schmidt the aforesaid 27½ shares of common stock. Appellant's counsel argue the case on the theory that the \$1500 paid by Schmidt to complete the corporation was presumptively for the payment of the stock. This is inconsistent with Schmidt's own testimony, as well as with the proceedings at the directors meetings to which he assented. He never claimed that he was to have more than a third interest under the preliminary arrangements for which he was to pay \$2,500 into the corporation, and claimed only 25 shares at the first meeting of the directors. While the \$1,500 was more than the amount the parties agreed to pay towards the common stock to begin with, yet as found by the master, it was paid into a "common fund" which was not only used to pay for the common stock but for machinery for the corporation and preliminary expenses of its organization.

But whatever previous oral arrangements were made between the parties, Schmidt, by signing the minutes of the directors' meetings, is estopped from now claiming arrangements different from those to which he assented by signing such minutes and on which the several parties acted, recognizing the ownership of August to 126 shares, of himself to 30 shares, of Kurth to 18 shares, and of the treasury to 76 shares, thus making the 250 shares. Such recognition of ownership on the basis of the respective contributions to the assets of the company is inconsistent with the theory that August held any portion of the said

verified at the very moment. Although his report stated that
 the evidence is very convincing, and that the facts tend to
 show that Smith by his own acts in the morning of December
 and stockholders is entangled from paying the claim out of the
 bill, and in fact, appointed others in his place that on their
 face the minutes of such meetings tend to show that he is entangled
 from paying the claim out of the bill. ^{He writes} That the above stated
 facts establish a convincing case. The power of the bill is
 that it must be taken in the case in which the company is
 bound to pay the claim. Smith's conduct in this case is
 such that the bill will be taken in which the company is
 not responsible for the payment of the stock. This is inconsistent
 with Smith's own testimony, as well as with the proceedings in
 the directors meeting in which he testified. He never claimed that
 he was in fact more than a third interested under the provisions
 of the bill which he was to pay \$1,000 into the corporation.
 and which only 25 shares of the bill were to be paid.
 with the \$1,000 was more than the amount the bill was to pay
 toward the common stock of Smith with the fact as stated by the minutes.
 it was paid into a "common fund" which was not only used to pay for
 the common stock but for the payment of the bill.
 evidence of the corporation.
 The directors meeting and the minutes of the same
 show the bill, which, in fact, the company is
 bound to pay. Inasmuch as the bill is
 taken from those to which he testified by stating that
 he was not more than a third interested under the provisions
 of the bill, and in fact the common fund was not used to pay for
 the common stock, but for the payment of the bill, the company is bound
 to pay the bill.

126 shares in trust for the other parties. The fact that when the corporation got on a dividend paying basis Schmidt and Kurth felt that they should have a greater proportion of the stock which had been issued on the basis of good will, and that August was disposed to relinquish some of his rights has no tendency to change the facts of record solemnly assented to as establishing their relative holdings and the considerations given therefor.

But it seems that the agreement, whatever it was, was to be in writing, and signed.

It was said in B. & C. S. W. S. S. Co. v. People, 195 Ill. 423:

"Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding and agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The true rule may be stated in these words: Where the parties make the reduction of the agreement to writing, and its signature by them, a condition precedent to its completion, it will not be a contract until that is done. And this is true although all the terms of the contract have been agreed upon."

What was there said seems applicable to the facts in the case at bar. The agreement whereby August was to hold in trust 27½ of these shares for Schmidt was to be reduced to writing and signed. It was not signed. Until it was there was no valid, binding contract with regard to the matter. The bill in question seems to rest upon the validity of the oral agreement which the writing submitted was intended to embody. All evidence as to what took place before such oral arrangement was evidently introduced as tending to show that such an arrangement was equitable. Whether it was or not it was not capable of enforcement as an oral agreement, the parties having contemplated it should be reduced to writing and signed. As to the facts preceding such oral negotiation for a trust agreement we think complainant was estopped

the company, it is not for the other parties. The fact that the company is not a division paying back to the stock which has been bought on the basis of good will, and that the company was disposed to relinquish some of its rights has no tendency to change the facts of record actually recorded in the evidence. Their relative holdings and the consideration given

to be in effect, and the fact that the company is not a division paying back to the stock which has been bought on the basis of good will, and that the company was disposed to relinquish some of its rights has no tendency to change the facts of record actually recorded in the evidence. Their relative holdings and the consideration given

the company is not a division paying back to the stock which has been bought on the basis of good will, and that the company was disposed to relinquish some of its rights has no tendency to change the facts of record actually recorded in the evidence. Their relative holdings and the consideration given

the company is not a division paying back to the stock which has been bought on the basis of good will, and that the company was disposed to relinquish some of its rights has no tendency to change the facts of record actually recorded in the evidence. Their relative holdings and the consideration given

from setting up anything different from what appears on the records of the corporation to which he affixed his signature. The decree dismissing the bill for want of equity will be affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

THE HISTORY OF THE UNITED STATES OF AMERICA
FROM 1763 TO 1876
BY CHARLES A. BEAMAN

NEW YORK

1876

1876

THE HISTORY OF THE UNITED STATES OF AMERICA
FROM 1763 TO 1876

MILLS NOVELTY COMPANY,
(a corporation).

Appellant,

v.

THE NATIONAL BANK OF THE
REPUBLIC, (a corporation).
Appellee.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

241 I.A. 610

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit to recover the amount of plaintiff's check on defendant bank on the ground that it was paid out without authority to endorse the payee's name, and that the bank had notice of that fact in the manner and form of the endorsement.

One Cryer had a contract with the Exposition Comercial Internacional, S. A., (hereinafter called the Exposition Company) to act as its agent in selling floor space in its exposition building in Mexico City, Mexico. By the terms of the contract said company was, under certain conditions, to lease or sell to said Cryer 2500 square feet of space on the first floor of said building in consideration of \$5000 he had paid under the contract. The contract provides that in the event of such sale, Cryer, the party of the second part, shall have "full right and authority to resell or sublease said space or any part thereof to any person or persons * * * as he might see fit, and for any price that he might desire, and shall have full right and authority to collect any part or all of the leased or sales price of said floor space at the time the contract subleasing or selling the same is entered into." The contract then provides that where a part of the sales or leased price of said floor space is not

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 10/10/01 BY 60322 UCBAW/STP

RECEIVED FROM
CHICAGO COUNTY
COOK COUNTY

THE CHICAGO COUNTY CLERK
CHICAGO, ILL. 60601

CHICAGO COUNTY CLERK

RETURNING THE OPINION OF THE COURT.

This is a writ in rem to recover the money
of Plaintiff's check on defendant bank on the ground that it
was held and retained wrongfully by defendant and its agent
and that the bank had notice of that fact in the manner and
time of the endorsement.

The Court has a copy of the Plaintiff's check
numbered 100,000,000, dated 10/10/01, for the sum of \$100,000.00.
It was in the Court's possession from the time it was
deposited in the Court's office, Chicago, Ill. The Court has
noted the check and, being satisfied that it was in the Court's
possession at the time it was deposited, it has issued the
writ in rem to recover the money of the Plaintiff's check.
The Court has also noted that the check was deposited in the
Court's office on 10/10/01, and that the Court has not
yet received the money of the check. The Court has also noted
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Court's office on 10/10/01, and that the Court has not yet
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the check was deposited in the Court's office on 10/10/01, and
that the Court has not yet received the money of the check.

paid at the time it is resold, or is paid to the company it shall pay Cryer a sum equivalent to the difference between the amount received by him and the contract price for which said space or any part thereof is leased or sold, such payment to be made promptly upon receipt of the contract or lease by the company. And the contract further provides that "all the contracts to be executed upon the forms used by the party of the first part, a copy of which is hereto attached."

The attached form thus referred to provided that all checks should be made payable to the order of said company.

Cryer's contract with said company expired July 1, 1922. On July 6th following he made a written contract with appellant in the name of said company on one of said forms purporting to sell appellant 982.92 square feet of floor space on the first floor of the building for \$3931.66 (at the company's regular schedule rate of \$4 a foot), for which appellant handed him its check for \$2800 on appellee bank, bearing the same date and payable to the order of said exposition company. Cryer had the check certified the next day, endorsed on its back the name of the company, "by E. J. Cryer, Agent," and then his own name, and deposited it in his personal account with the Illinois Trust & Savings Bank, Chicago. The check was cleared in due course and paid by appellee bank and charged to appellant's account.

Bearing the same date, July 6th, Cryer addressed a letter to plaintiff acknowledging the receipt of the check for \$2800 "in full payment of space," etc., which was signed in the name of the company by said Cryer. On July 21, the company's director general wrote a letter to plaintiff from its office in New York stating that the memorandum of its agreement of July 6, 1922, had been forwarded to it on the 18th inst., by its "ex-agent" Cryer, evidently, as was assumed, to obtain its approval of plaintiff as

that at the time it is made, or in fact to the company it shall pay to the company a sum equivalent to the difference between the amount received by him and the amount paid for which said sum or any part thereof is loaned or sold, with payment to be made promptly upon receipt of the contract or bonds by the company, and the contract further provides that "all the amounts to be credited upon the terms fixed by the party in the first part, a copy of which is hereto attached."

The attached form was returned to plaintiff that day.

There should be made payable to the order of said company.

Company's contract with plaintiff dated July 1, 1920.

At this time plaintiff made a written contract with defendant in the name of said company on one of said forms purporting to sell defendant \$500.00 worth of bonds at \$100.00 per bond on the first of the month for \$500.00 (at the company's regular monthly rate of \$2.00), for which defendant handed him the cash for \$500.00 on plaintiff's bank, bearing the name of said company and the order of said company. After the cash was received the money was deposited on the book the name of the company, "E. J. Geyer, Agent," and when the money was deposited it is in his personal account with the Illinois Trust & Savings Bank, Chicago. The check was deposited in the account with the company's bank and changed to plaintiff's account.

During the same date, July 1st, 1920, defendant received a letter from plaintiff acknowledging the receipt of the check for \$500.00 in full payment of bonds, etc., which was signed in the name of the company by E. J. Geyer. On July 1st, the company's director received a letter from plaintiff from the office in New York regarding the redemption of the bonds at \$100.00 per bond, and was informed that it is the law, by the "act" of July 1st, 1920, that he was required to obtain the approval of plaintiff as

an exhibitor. The letter acknowledged the right of Cryer on the termination of his agency to resell the space, but stated that the company was not undertaking to make any contract with plaintiff, that it should be made by plaintiff with Cryer, and the check should be made payable to him and not to the order of the company. The letter, however, approved of plaintiff as an exhibitor and gave it information of the postponement of the time of opening the exposition and the time for forwarding the exhibits. Replying to this letter on July 26, plaintiff stated in effect that it supposed it was making the contract with the company, it being on its printed form, and after referring to the form of its check and the endorsements asked for an affidavit at the earliest possible moment to the effect that said Cryer did not have authority to endorse the company's name on said check. An affidavit to that effect was sent to plaintiff on July 28. Of same date the company wrote plaintiff a letter in reply to its letter of July 26. In it it again stated that Cryer had the privilege of selling said space, subject to the conditions of its regular printed form of exhibitor's contract, (which were set forth in the contract form used) but that Cryer in so doing was not acting as its agent and had no authority to endorse its check, and added: "As we do not wish to see you suffer in this matter, we will say that we are perfectly willing to have you use the space bought of Mr. Cryer, during our exposition, December 1 to December 31, 1922," (when the exposition was to be held) "and await your acceptance so that we can list your name among our exhibitors."

It does not appear that plaintiff rescinded the contract or rejected such offer and ratification of it. Nor does it appear that any notice of these proceedings and of such correspondence or of the alleged want of authority by Cryer to endorse the company's name on the check as aforesaid, was ever brought to the attention of defendant bank prior to the beginning of the suit on November

an exhibition. The paper acknowledged the rights of the exhibitor in the
termination of his agency to possess the goods, and stated that
the company was not authorized to make any contract with him
and that it should be made by himself with the exhibitor, and the
goods should be made payable to him and not to the order of the
company. The letter, however, approved of plaintiff as an exhibitor
and gave it information of the postponement of the time of opening
the exhibition and the time for forwarding the exhibits. Nothing
on this letter of July 26, plaintiff stated in effect that it
appeared to him that the contract with the company, it being an
open contract, was not subject to the law of the State and
the exhibitor could not be subject to the law of the State
in regard to the right that said paper was not subject to the
law of the State. The company's name on said check, an exhibit to the
letter was sent to plaintiff on July 26. At some date the company
made plaintiff a letter in reply to the letter of July 26. In it
it again stated that the exhibitor had the privilege of selling and
subject to the conditions of the regular printed form of exhibitor's
contract. There were one fourth in the contract form used, but that
there is no thing was not acting as the agent and had no authority
to receive the check, and stated: "We do not wish to see you
again in this matter, we will say that we are positively willing to
have you use the goods bought of Mr. Geyer, during our exhibition,
December 1 to December 31, 1892," (when the exhibition was to be
held) "but would have no objection to that we can find your name
among our exhibitors."

It does not appear that plaintiff remained the contract
or refused such offer and violation of it. But does it appear
that any notice of these proceedings and of such proceedings
or of the alleged want of authority by Geyer to enforce the company's
name on the check as exhibitor, was ever brought to the attention

27, 1922, some four months later. It appears that the exposition was not held - that the company went into bankruptcy at some later period.

From this evidence we think two presumptions must be indulged: (1) that in the absence of a rescission or proof thereof plaintiff accepted its status as an exhibitor, which was not altered by the fact that the company subsequently went into bankruptcy; and (2) that plaintiff having accepted such status with knowledge that Cryer was entitled to the proceeds of the sale, and, as may be inferred from absence of proof to the contrary, having allowed its check to be charged up against its account in defendant bank without notifying the bank of any want of authority of Cryer to endorse the check, until it brought its suit, it acquiesced in the charge.

If the endorsement was made without authority it was plaintiff's duty, if it did not intend to abide by the transaction, to notify the bank thereof promptly or within a reasonable time in order that it might take steps to prevent its loss, which would be presumed from delay or negligence as to notify it. (First State Bank v. First National Bank, 314 Ill. 269, 273; Union National Bank v. Farmers' & Mechanics' National Bank, (Pa.) 16 A. L. R. Ann. 1130.) In the case first cited the court recognized the principle that when there has been an unreasonable delay in discovering and giving notice of a forgery it will bar a recovery. In that case there was failure to report the forgery for upwards of three months. We think the same principle is applicable to the case at bar.

However, notwithstanding the exposition company stated in its letter of July 28, that Cryer had no authority to endorse its check, its contract, as above set forth, by which that question must be determined, shows the contrary. It allowed him the right to resell the space in question and re-

quired him to use one of its forms which not only provided that checks in payment should be made out to its order, but gave him full right and authority to collect the price of such sale, and if any part thereof was not paid for, the company would pay him promptly upon receipt of the contract for the difference between the amount received and the amount not paid for, thus impliedly, if not expressly, authorizing him to endorse a check given for his own space and benefit, though required to be made payable to its order. In other words, while the same formalities were required as if the sale was made by the company it nevertheless recognized the sales price belonged to Cryer and expressly gave him the right to collect the same. The effect of the transaction was to establish a contract relation between the company and appellant so far as the former was obliged to reserve the space, and the latter to observe the conditions of the reservation, but under the provisions of Cryer's contract with the company, the purchase price and check given therefor belonged to Cryer with his right to convert it into cash.

We think, therefore, that defendant sustained the burden cast upon it of showing authority to endorse the check. But before it was obliged under the issues to show such authority plaintiff was bound to show diligence on its part to enable the bank to prevent loss to it, and there was no affirmative proof of such diligence.

In view of this conclusion it is immaterial whether or not appellant knew that Cryer was selling his own space. But on that fact we cannot say that the verdict is manifestly against the weight of the evidence. Appellant contends that this was the crucial fact in the case, and that because the negotiations for the contract were had with its president, in the presence and hearing of his son, and they both denied Cryer's testimony to the effect that the former knew Cryer was selling his own space.

gives him the use of the house which was only provided
that should in payment should be made out to his order, but
gives him full right and authority to collect the price of such
sale, and if any part thereof was not sold for, the company
would pay him promptly when receipt of the contract for the
difference between the amount received and the amount well paid
for, thus implying, it was necessary, to be paid for the
company's stock given for his own share and benefit, though
required to be made payable to his order. In other words, while
the same terms/conditions were required as if the sale was made by the
company it nevertheless transferred the entire price received to
Gibson and expressly gave him the right to collect the same. The
effect of the transaction was to transfer a property interest
between the company and Gibson on the one hand and Gibson and Gibson
to receive the price, and the latter in return the consideration of
the consideration, but where the consideration of Gibson's contract
with the company, the company price and stock given for the
balance to Gibson with this right to receive it later on.

It is further stated that the company retained the
power and right of its trading business in relation to the stock.
The effect is not to transfer the right to the stock to Gibson
wholly and to leave to the company the right to receive the
price in payment later on, and there was no intention of
of such character.

It is of this transaction to be understood that it
was required that Gibson was to have the same. The
to that fact he would say that the contract is made with Gibson
the right of the company, especially because that this was the
contract for the same, and that because the negotiation for
the contract was made with the company, in the company and
in favor of the stock, and that the company's testimony to

and read his contract with the company, the preponderance of the evidence was with appellant. But there was other testimony bearing upon the fact which the jury probably considered in determining the credibility of the witnesses on this point. The contract called for a payment of \$2800 on a purchase price of \$3931.68. On the same day Cryer's letter acknowledged the \$2800 as payment in full. In explanation of this he testified that he was obliged to follow the exposition company's form of contract which required the sale of such space for such price (at \$4 per square foot), and as under his contract he could sell his own space at any price he saw fit, he negotiated the sale therefor in fact for \$2800, and in justification of his authority as to do hold appellant's president it was his own space and showed him his contract with the company. Appellant's president met such testimony by testifying that the day after the contract was entered into Cryer came to him and said that he could settle the contract for less money if he paid cash. This is not only inconsistent with an acknowledgment of the payment in full on the previous day, but also with the fact that \$2800 would be received in any event by the terms of the contract. It is rather difficult to understand why if his testimony is true, Cryer should surrender his right to over \$1000 yet to be paid under the contract, or plaintiff should not have had the contract changed which put it under that obligation. Such an arrangement would of itself put appellant on inquiry as to Cryer's authority to make it, which would naturally have been explained by reference to the company's contract giving Cryer space he might sell for himself. We cannot say, therefore, that the verdict was manifestly against the weight of the evidence and think the judgment should be affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

and took his contract with the company, the proposition was at
the witness was with appellant. But there was other testimony
bearing upon the fact with the very probably conclusion in
determining the credibility of the witness on this point.

The contract called for a payment of \$2500 on a purchase price
of \$2500.00. On the same day Cyper's letter acknowledged the
\$2500 as payment in full. In explanation of this he testified
that he was obliged to follow the expedition company's form of
contract which required the sale of such space for each party
(at \$2 per square foot), and as under his contract he could sell
his own space at any price he saw fit, he negotiated the sale
therefor in full for \$2500, and in justification of his authority

as to the above statement, a receipt is on his own space and
shows the \$2500.00 was received. The receipt is dated
and was testimony to testify that the day after the receipt
was taken into Cyper's office and he said that he could testify
the contract for less money it be paid cash. This is not only

inconsistent with an acknowledgment of the payment in full on the
previous day, but also with the fact that \$2500 would be received
in full at the time of the contract. It is rather difficult
to understand why it is testimony is true, Cyper should understand
his rights to over \$1000 yet to be paid under the contract, or

plaintiff should not have had the contract changed which put it
under that obligation. Even an arrangement would of itself not
constitute an inquiry as to Cyper's authority to make it, which could
naturally have been explained by reference to the company's con-

tract giving Cyper space he might sell for himself. He cannot
say, therefore, that the verdict was manifestly against the weight
of the evidence and that the judgment should be affirmed.

W. R. COLLIER, for the use of
AMERICAN SOCIETY OF ACCOUNTANTS,
a corporation,
Appellee,

v.

PHOENIX MUTUAL LIFE INSURANCE
COMPANY, of Hartford, a corporation,
Appellant.

5/4/20
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

241 I.A. 610

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal presents the question whether the court exercised a sound discretion in denying the motion of the garnishee to vacate a final judgment against him.

Both the conditional judgment and the final judgment were entered by default of the garnishee to appear on the return day after service was made for each occasion upon its local officer or agent.

From the affidavit of its local assistant manager, filed in support of the motion, it appears that on each return day he attended the court and heard the case called, but being ignorant of the procedure or its effect and not having the advice of a lawyer, neither made an oral response nor filed an answer, and that he did not have knowledge of the judgment until service of the execution. His affidavit also sets up that the garnishee was not indebted to the judgment debtor and never had been.

While there is no pretense that ignorance of the law alone justified the motion it is urged ~~that~~ upon the state of facts set forth in the affidavit showing a good defense to the merits and good faith in affiant's attendance in response to the writ on each occasion, though in ignorance of what he was to do,

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that to promote justice the court's discretion should have been exercised in favor of the motion. It has been held in this State that notwithstanding it was a matter of discretion whether a default should be set aside, still, cases may arise in which there has been such a state of facts as to call upon the court to interpose, to promote justice, by reviewing a decision made in the exercise of discretionary power. (Seales v. Labar, 51 Ill. 233; Mason v. McManara et al., 57 Ill. 274, 277.) We think this is one of those cases, especially as a more liberal rule is generally applied to applications of garnishees for relief from defaults than is applied to applications by ordinary defendants. This is because a garnishee is not an interested party in the proceeding as far as any prospect of being benefited is concerned, yet an interested third person so far as the danger of being injured is concerned. (Corpus Juris, Vol. 28, p. 338; First State Bank v. Erenelka, 23 Mo. Dak., Vol. 23, 568; Waples on Judgments and Garnishments, 2d Ed., sec. 501; Evans v. Mohr, 55 Ia. 302.) In a similar case where the garnishee thought he was required by the writ to appear in court in person and answer orally as a witness, and was in fact in attendance for such purpose, and a default was taken against him, it was held that the court exercised a sound discretion in vacating the judgment. (Marx v. Epstein, 1 Tex. App. Civ. Cas. 1317.)

In view of our conclusion that the court abused its discretion in such circumstances in not vacating the judgment, the motion for which was made within thirty days of its entry, we need not consider the other point urged that the final judgment was a nullity.

Accordingly the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

STANDARD SANITARY MANUFACTURING
COMPANY, a corporation,
appellant,

v.

JAMES E. WALLER and
JAMES L. BECKWITH,
appellees.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

241 I.A. 611

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment on the court's finding against plaintiff on stipulated facts. Plaintiff is the lessee of certain real estate, and defendants are remote assignees of the lessor. The lease is for a described lot and a building to be erected thereon "in accordance with plans and specifications attached thereto." The roofing specifications provide for covering the entire roof with four layers of felt and gravel, and for flashing around the chimney, "the whole to be done in a thorough and workmanlike manner and guaranteed for five years." Before the expiration of the five years the roof having leaked from some cause or causes not disclosed in the stipulation of facts, whether from poor material, bad workmanship or otherwise, plaintiff requested defendants to repair the same. They refused and repairs were made by plaintiff, for which it seeks by this suit to be reimbursed.

The theory of plaintiff's claim is that said guaranty clause in the written specifications constitutes a covenant on the part of the lessor which runs with the land and is binding on the assignees. This is a misconception. The guaranty was one by the contractor to the lessor, not by the lessor to the lessee, and constitutes no legitimate part of the specifications as such, in the sense in which they are referred to in the lease. True, the

lease called for construction of a building in accordance with the plans and specifications, and for aught shown to the contrary it was so constructed. But there may be construction according to plans and specifications and still not fulfill the promise of their endurance. The guaranty was an independent undertaking of the contractor in effect that if, constructed according to the specifications, the roof did not last and withstand the elements for five years, he would make it good for that length of time. But the lease did not provide expressly or by ^{its} reference to the specifications, that the lessor or his assigns would warrant the work, and make necessary repairs if the contractor did not. In fact, the lease contains numerous provisions that negative any such construction or intention. It expressly provides that the lessee has examined and knows the conditions and requirements as outlined in the attached plans and specifications, that it would take possession on completion of the building, and ask no further requirements of the lessor; that on taking possession it acknowledges the building has been erected in compliance with the terms of the demise and shall have no further claim or claims against the lessor, unless at the time of taking possession it shall furnish a written statement to the lessor giving in detail such objections as it may have in connection with the unfinished construction according to the plans and specifications; that the lessor shall not be liable for any damage occasioned by failure to keep said premises in repair, or for damage occasioned by water, snow or ice being upon or coming through the roof, ^{or} arising from any acts of co-tenants or other occupants of the same building, or of any owners or occupants of adjacent or contiguous property.

There is no evidence that on taking possession of the Property plaintiff submitted any statement in writing of objections

...the plan and specifications, and the design shown in the drawings
it was so constructed. But there was no construction according
to plan and specifications and still was built the present of
this structure. The structure was an independent building of
the structure in which it, constructed according to the
specifications, the work did not lead and obtained the elements
the five years, he would make it good for the length of time. The
the house did not provide expressly or otherwise in the
specifications, that the house or his design would contain the
work, and also necessary repairs if the structure did not. In
fact, the house contains numerous provisions that negative any
such construction or addition. It expressly provides that the
structure has contained the house in which it was constructed
is contained in the attached plans and specifications, that it
shall have provision in connection of the building, and no
further requirements of the house; that on taking possession of
the building the building has been erected in compliance with the
plans of the house and shall have no further claim or claim
against the house, unless at the time of taking possession it
shall contain a written statement to the house stating in detail
what additions or changes have been made in connection with the building
and stating according to the plans and specifications; that the
house shall not be liable for any change constructed by others to
the building in respect to the house structure or work,
except as the house or owner thereof the work arising from
the work of additions or other changes at the time building
it is made in compliance with the plans and specifications.

There is no evidence that on taking possession of the
house the building contained any statement in any form of additions

to the construction, nor how the leak in the roof was caused, whether from poor construction or otherwise. The lease clearly provides that the lessee shall make repairs at its own expense, and expressly that the landlord shall not be responsible or liable for any damage occasioned by any water coming through the roof. Taking into consideration all the covenants and agreements in the lease we think plaintiff has no cause of action.

The judgment is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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Journal of the American Statistical Association

Journal of Interpersonal Violence 28(10)

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Journal of Interpersonal Violence 28(10)br/>© The Author(s) 2013
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189 - 30450

WILLIAM G. SHAY,
Appellant,

v.

JEAN A. SHAY,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

241 I.A. 611

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order increasing an allowance appellant was previously ordered to pay for the support of his two children by marriage with appellee, his former wife, from whom he obtained a divorce. The children, however, were awarded to her custody.

The petition for such increase was filed by appellee, setting forth that on December 21, 1917, he had been ordered to pay \$50 per month for their support; that she was now obliged to send them to school as they had attained school age; that said allowance was inadequate for their support, maintenance and education; that both children required medical attention for reasons stated in the petition; that her power to support the children had become impaired, and that appellant was now earning in excess of \$300 per month.

Appellant's answer to the petition set up that he was receiving \$275 per month as a dentist in a position not permanent, by reason of which he had equipped an outside office to establish himself in the practice of his profession to prepare for the contingency of the termination of his employment, for which he had borrowed money and incurred a large indebtedness; that he was again married and thereby subjected to increased expenses, and if he were required to pay an additional allowance it would work a great hardship upon him.

1903

WILLIAM C. HAY

ANTHONY J. HAY

DIRECTOR

NEW YORK

411 I.A. 611

THE JUDICIAL SYSTEM HAS BEEN THE OBJECT OF THE COURT.

This appeal is from an order increasing an allowance
applicant was previously ordered to pay for the support of his
two children by marriage with appellee, his former wife, from
when he obtained a divorce. The children, however, were
awarded to her custody.

The position for each income was filed by appellee,

setting forth that on December 31, 1917, he had been ordered
to pay \$50 per month for their support; that she was now ordered
to send them to school as they had attained school age; that said
allowance was inadequate for their support, maintenance and
education; that both children required medical attention for
tuberculosis of the pelvis; and that there is support for
children and their expenses, and that appellee was not earning
in excess of \$100 per month.

Appellant is content in the position set in 1917 and was
ordered \$75 per month as a default in a position not permanent,
by reason of which he had assigned an outside office as a condition
precedent in the granting of his protection to prepare for the
contingency of the termination of his employment, for which he had
advanced money and incurred a large indebtedness; that he was
unable to thereby suggested to increased expenses, and
it was required to pay an additional allowance it would not

When the petition was called up appellant in reply to the court's inquiries stated that when the decree was entered he was earning \$100 a month, but at that time his income was \$275 a month. His counsel then remarked that as the order entered shortly after the divorce required a payment of \$25 a month for the support of the children and later, in December, 1921, it was changed to \$50 a month, he wished to prove the allegations in the answer as to appellant's expenditures as therein specified, and that in 1917, while making less money his expenses were pro rata less than when making more money and married again, and that his wife was about to be confined. The court ruled in effect that the proof would be immaterial or unnecessary, for admitting the truth of these facts which were set up in the answer it appeared that when the order of 1917 was entered his income was only \$100 a month, whereas it was now \$275 a month, and accordingly entered the order increasing the allowance from \$50 to \$75 per month.

We fail to see any error or abuse of discretion in the order or the procedure. The court having admitted as true all appellant wished to prove, he was denied no opportunity to present what he wished the court to consider. The children were wards of the court, and it unquestionably had jurisdiction to require appellant to make adequate provision for their needs so far as he was able to do so. As said in Plaster v. Plaster, 47 Ill. 299, a somewhat similar case, the decree did not impose upon the mother the duty to support the children nor release the father from that obligation. Of course, increased expenses incident to a second marriage or the effort of appellant to establish himself in the practice of his profession had no such effect. While he cannot be required to pay beyond his ability, we cannot say from the admitted facts that the order requires him to. The court is still open to him if his circumstances justify its modification.

His counsel has cited cases to the effect that to justify

When the petition was called up for consideration in reply to the court's decision stated that when the answer was entered he was earning \$200 a month, but at that time his income was \$200 a month. His counsel then remarked that at the order entered shortly after the divorce required a payment of \$200 a month for the support of the children and later, in December, 1921, it was changed to \$200 a month. He wished to prove the allegations in the answer as to appellant's expenditures as therein specified, and that in 1919, while making these money his expenses were not less than when making more money and savings again, and that his wife was about to be confined. The court ruled in effect that the proof would be immaterial or unnecessary, for admitting the truth of these facts which were set up in the answer it appeared that when the order of 1917 was entered his income was only \$200 a month, whereas it was now \$200 a month, and accordingly entered the order increasing the allowance from \$200 to \$250 per month. He failed to see any error or abuse of discretion in the order in the procedure. The court having admitted as true all allegations aimed to prove, he was denied an opportunity to present and he wished the court to consider. The children were under the court, and it was undoubtedly had jurisdiction to require appellant to make adequate provision for their needs as far as he was able to do so. As held in Pittman v. Pittman, 27 Ill. 289, a permanent alimony award, the answer did not impose upon the mother the duty to support the children and relieve the father from that obligation. Of course, increased expenses incident to a second marriage or the effort of appellant to establish himself in the practice of his profession had no such effect. While he cannot be required to pay beyond his ability, we cannot say from the evidence that the court's order requires him to. The court is still open to him in the circumstances justify the modification.

an order for an increase of alimony proof should be made of a change of circumstances from those considered when the original order was entered. The order appealed from is not an order for increased alimony but for support of the children. These two obligations for which the court may make provision under section 14 of the Divorce Act are distinct and separate. (Konitzer v. Konitzer, 112 Ill. App. 326; Plaster v. Plaster, suara; Foots v. Foots, 22 Ill. 425.) In the Plaster case an order for the support of the children, entered twelve years after the decree of divorce, and after the order for alimony had been discharged, was affirmed wholly upon the obligation of the father to support them.

But if any such proof was requisite it sufficiently appeared in the fact of the change in appellant's income and the new necessities and conditions of the children since the first order for their support was entered.

The order appealed from is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

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THESE ARE THE ONLY TWO COPIES OF THE REPORT
REMAINED IN THE FOOT OF THE CHARGE IN SPECIAL AGENT'S INQUIRY AND
THE NEW INVESTIGATION AND CONSIDERATION OF THE CHARGE AGAIN FOR
THESE ARE THE ONLY TWO COPIES OF THE REPORT
REMAINED IN THE FOOT OF THE CHARGE IN SPECIAL AGENT'S INQUIRY AND
THE NEW INVESTIGATION AND CONSIDERATION OF THE CHARGE AGAIN FOR

* * *

204 - 30465

HARRY A. TENNYSON,
Appellee.

v.

OSCAR MAYER & COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 611

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit in detinue brought in the Municipal court of Chicago to obtain possession of an automobile valued at \$2000. The statement of claim sets forth the essential elements of such a cause of action. The affidavit of merits sets up the special defense that the property was detained as partial security for the payment of an indebtedness due from plaintiff, and that it had a legal right to retain the property until such indebtedness is fully paid and discharged. Defendant appeals from a judgment against it.

On submission of the case to the court without a preliminary jury it was acknowledged by defendant's counsel in his ^{preliminary} statement to the court that such was the issue to be tried. In response to the court's inquiry he stated that the property "was acquired as a pledge for an indebtedness; * * * we claim that there is an indebtedness and that we lawfully came into possession of the car and are legally detaining it until he shall pay us the money; * * * we have never been paid, we are keeping it lawfully. He is indebted to us and he pledged us the car in the first instance." There can be no question, therefore, of the issue presented both by the pleadings and the admissions in open court. Nevertheless, defendant neither proved nor

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attempted to prove a pledge, and none is disclosed by the circumstances in evidence. On the contrary, defendant undertook to prove that plaintiff "gave" it the automobile to apply on his alleged indebtedness - though there was no attempt to prove an agreement to take it at any specific value - and seeks a reversal of the judgment claiming that the preponderance of evidence shows its ownership thereof. But that was not the defense or recognized issue. All evidence on that subject should have been disregarded as irrelevant; and in this connection it may be said that defendant's offer in evidence of several signed, lengthy interviews and confessions of appellee bearing upon defalcations by which he became indebted to it and which he had already testified to and admitted, was properly excluded for their irrelevancy in their entirety if for no other reason. The offer, however, was made on the ground of impeachment. If admissible for that purpose then defendant should have offered the relevant parts thereof and not the entire documents.

No contention is made by appellant that such pleadings ^{that} were not required, or it was relieved by any rule of court from conforming to the ordinary course of procedure requiring adherence to issues formed by the pleadings. When reminded that defendant had admitted plaintiff's ownership of the car in its pleadings, and that it was stated under oath that the car was put up as a pledge, its counsel remarked: "Oh, that is just pleadings, we don't have to stand by our pleadings; we can always change them." But while counsel recognized the necessity of amending the affidavit of merits by changing the word "indebtedness" from the singular to the plural, he neither made nor asked any change in the pleading with respect to the ground on which defendant claimed the right to detain the automobile. In the course of the trial, when

attempted to prove a thing, and none is discussed by the
allegation in evidence. On the contrary, defendant under-
took to prove that plaintiff "gave" it the authority to apply
on his alleged independence - though there was no attempt to
prove an agreement to take it as any specific value - and
again a review of the judgment claiming that the proceedings
of evidence shows the contrary thereof. But that was not
the failure at independent issue. All evidence on that subject
should have been introduced as irrelevant; and in this connection
it may be said that defendant's offer in evidence of several signed,
legally authentic and authentic of special bearing was
collateral to what he sought to prove in it and that he had
already failed to get what he sought, and thereby entitled for that
irrelevantly in that matter it is in that matter. The offer,
however, was made on the ground of relevance. It was made for
that purpose and defendant should have offered the relevant
evidence instead and not the entire document.

It is stated in note by applicant that such proceedings
were not rejected, or it was rejected by any rule of court from
connecting to the ordinary course of procedure regarding admission
as issues raised by the pleadings. When examined that defendant
had admitted plaintiff's ownership of the car in the complaint,
and that it was stated under oath that the car was not up to a
plaintiff, the material complaint; "Oh, that is just a thing, so
don't have to stand by our pleading; we can always change them."
and while counsel recognized the necessity of amending the affidavit
it was by amendment of the "complaint" that the amendment to
the complaint in which was asked was made in the pleading
also sought in the ground on which defendant claimed the right
to obtain the automobile. In the course of the trial, when

again reminded of the issue, he remarked: "Sure, and we have the right to convert it into money or keep the property."

Defendant pleaded as a special defense that it retained possession of the property as security and not as the owner thereof. It did not sustain that defense. If the court did not disregard the evidence bearing on a different issue, as it should have done, its findings, however, both as expressed orally and in the judgment, negative both the claim of a pledge and that of defendant's ownership of the property.

While from a review of the entire evidence we would not be disposed to differ from the court's conclusions on either proposition, it is unnecessary in the view we have taken to discuss the relative weight of evidence on what was not an issue in the case.

Appellant's counsel have also departed from the issues by urging in this court that under the circumstances of the case defendant had an equitable lien on the automobile. Not only was there no such issue pleaded and no such contention urged in the trial below but mere equitable title is not sufficient to defeat an action in detinue. (Hicks v. Meadows et al., 193 Ala. 246, 257; 16 C. J. 1003.) The judgment will be affirmed, and appellant will be taxed with the usual costs and for 12 pages of an additional abstract.

AFFIRMED.

Gridley and Fitch, JJ., concur.

again possession of the house, he committed "acts" and we have

the right to convert it into money or keep the property."

Defendants pleaded as a special defense that it retained

possession of the property as security and not as the owner thereof.

It did not contain that defense. If the court did not disregard the

defense, it would be a legal error, as it should have been.

Finally, however, with no evidence at all in the defense,

negative only the claim of a right and that is not a defense.

End of the report.

With this review of the entire evidence we would not

be disposed to differ from the court's conclusions as stated

previously. It is unnecessary to say that we have taken no action

the relative value of evidence as that was not in issue in the case.

Defendants' counsel have also stated that the issue of

whether it was worth their while to litigate at this time is not

not an equitable issue to the court. But only we should be

that issue should be an open question upon the trial before

we were satisfied that it was entitled to be heard on notice to

the court. (Exhibit 1, page 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

THIRTY.

THIRTY AND FIFTY, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

213 - 30474

H. J. UMBRIGHT,
Appellee,

v.

CLAUDE W. MORRIS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

241 I.A. 61F

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for failure of defendant to carry out his contract to sell a certain lot, with a frontage of 33 feet, to plaintiff, which the court assessed at \$1720.75, a jury having been waived.

This sum included \$1324.75 paid by plaintiff on the contract price of \$1650, and \$396 (on the basis of \$62 a front foot) as increased value of the lot at the time of defendant's refusal to complete the contract.

The only point relied on for reversal is the alleged lack of competent evidence on which to base a finding of such increase in value.

Plaintiff produced two witnesses who fixed the value of the lot at \$2475, and \$2000 to \$2100, respectively. Their testimony was evidently based on a misapprehension of the classification of the lot under a zoning ordinance, supposing it to have been classified for apartments of three or more stories on August 9, 1922, when the right of action accrued.

The competency of the proof of the classification under the ordinance, on which the testimony of said witnesses seems in part, at least, to rest, is questioned. By mutual consent it was left to the court to ascertain the same from records of the classification. The court seems to have acted

on information with respect thereto furnished by its clerk whom the trial court sent to make the investigation. Before entry of the judgment, however, at the time of the motion for a new trial, the ordinance, so far as it bears on the point in controversy, was read into the record, and as read seems to justify appellant's contention that the lot belonged to a classification for a use and size of building less valuable than the classification on which said witnesses seem to have based their valuation.

One of said witnesses also testified that similarly located lots in the neighborhood could be bought for \$1800, and it was stipulated that another witness for plaintiff, if present, would testify to a valuation of \$55 per foot, that is, \$1815. Defendant placed a valuation thereon of \$1600.

The court's valuation was \$2046, at the rate of \$62 a foot, which seems to have been a compromise between the high valuations of plaintiff's two witnesses, aforesaid, and said lesser valuations. But as the higher valuations were fixed upon a misapprehension of the actual classification of the lot under the zoning ordinance, the court had no competent evidence before it that would warrant a higher valuation than \$1815, an excess of \$165 over the purchase price.

Plaintiff was also deprived of the use of the \$1324.75 from January 27, 1923, to March 10, 1925, amounting to \$140.25 at the rate of 5% interest. His damage, then, included said principal and interest, and \$165 increased value of the lot, amounting in all to \$1630. We therefore find the facts accordingly and enter judgment here for that sum, each party to pay his own costs.

REVERSED WITH FINDINGS OF FACT
AND JUDGMENT HERE FOR \$1630.

Gridley and Fitch, JJ., concur.

the information which was furnished by the clerk when
the trial court sent to make the investigation. Before entry of the judgment,
however, at the time of the motion for a new trial, the evidence
was not on its face on the point in controversy, and was not into the
record, and so there seems to justify appellant's contention that
the lot belonged to a third person for a use and aim of public-
ity less valuable than the classification on which said witness
seem to have based their valuation.

One of said witnesses also testified that similarly
located lots in the neighborhood could be bought for \$1200, and
it was stipulated that another witness for plaintiff, if present,
could testify to a valuation of \$60 per foot, that is, \$1200.
Defendant placed a valuation between of \$1000.

The court's valuation was \$2000, at the rate of \$20 a
foot, which was in fact a valuation of \$2000 per foot.
Plaintiff's two witnesses, if present, and said witness
valued the lot as the higher valuation was fixed upon a mis-
apprehension of the actual classification of the lot under the
existing ordinance, the court had no competent evidence before it
that would warrant a higher valuation than \$1200, an excess of
\$800 over the purchase price.

Plaintiff was also deprived of the use of the \$1200.75
from January 27, 1900, to March 10, 1902, amounting to \$44.25
at the rate of 3 1/2 percent. His damages, then, included said
principal and interest, and this increased value of the lot.
Amounting in all to \$44.25. He therefore filed this bill accordingly
and asked judgment here for that sum, each party to pay his own
costs.

RECORDED WITH DEEDS OF PAGE
AND RETURNED WITH THE \$1000.

213 - 30474

FINDINGS OF FACT.

We find that the increased value of the lot in question at the time of appellant's refusal to carry out his contract was \$165, which added to \$1324.75 paid thereon by appellee, not returned or duly tendered to him, and legal interest on the latter sum at 5% from time of payment to breach of the contract, makes the sum of \$1630, which should be assessed as appellee's damages.

DR. R. LAMOTHE et al.,
Plaintiffs in Error,

v.

WILLIAM S. HOOVER et al.,
Defendants in Error.

5141a
ERROR TO

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 611

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a decree requiring plaintiffs in error to pay to a receiver the amounts of money collected by them upon subscriptions to the capital stock of a proposed life insurance company which they unsuccessfully attempted to organize.

In November, 1916, nine of the ten plaintiffs in error signed a declaration of intention to form such a corporation under the laws of Illinois, filed it with the insurance superintendent, and were duly authorized to open books of subscription for the capital stock of a corporation to be known as the "Hercules Life Insurance Company," with a capital of \$500,000, divided into 10,000 shares of the par value of \$50 each. Thereupon, the nine corporators entered into an agreement with plaintiff in error Max Spiegel providing that Spiegel should have the power, during the organization period, to purchase necessary office supplies, employ help, and engage solicitors to assist him in getting subscriptions for the capital stock, which expenses were to be "defrayed from the surplus on shares sold," and that "for procuring subscriptions" he should receive a commission of twenty-five per cent, "to be paid from the payments as made by the subscribers," Spiegel agreeing on his part to "get subscriptions to the said stock at the price of \$100 per share." Pursuant to this agreement, Spiegel opened offices,

3411.A.611

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This was of course it is sought to recover a debt
resulting plaintiff in error to pay to a receiver the amount
of money collected by him from subscriptions in the capital
stock of a company this instrument was not a bill of exchange
fully assigned to plaintiff.

In November, 1910, nine of the ten plaintiffs in error
signed a declaration of intention to form such a corporation under
the laws of Illinois, this is not the instrument in question
and were duly authorized to open books of subscription for the
capital stock of a corporation to be known as the American Life
Insurance Company, with a capital of \$500,000, divided into 10,000
shares of the par value of \$50 each. Thereupon, the nine subscrip-
tors entered into an agreement with plaintiff in error and signed
the instrument which plaintiff should have the power, during the organiza-
tion period, to purchase necessary office supplies, employ help,
and engage collectors to collect him in getting subscriptions for
the capital stock, this agreement was to be "subject to the
action on motion said," and was "for the purpose of organization."
It should contain a declaration of intent to form a corporation
with the purpose of doing so by the instrument, "subject to the
action on motion said" on the part of the subscribers on the part of
the corporation, "subject to this agreement, signed and sealed with
their own hands."

solicited subscriptions to the capital stock of the proposed corporation, and collected payments thereon aggregating \$37,800. The organization was never completed. The attempt to organize it was definitely abandoned in June, 1918, and at that time, upon a bill filed by M. Johnson, one of the plaintiffs in error, against the others, alleging that all the amounts collected were trust funds, a receiver was appointed to take charge of what remained of them. The receiver's total receipts were \$6035.35, including \$3720.57 collected as the result of a foreclosure decree, which was affirmed by this court in Spiegel v. Selberg, 226 Ill. App. 446.

In September, 1918, a cross-bill was filed by two of the stock subscribers, seeking to charge plaintiffs in error with liability as partners, and in October, 1921, a second cross-bill was filed by six other subscribers in their own behalf and that of all others, charging that the collections made upon subscriptions for stock were a trust fund and that the agreement with Spiegel was illegal. In July, 1922, issues having been joined on the original bill and both cross-bills, evidence was heard in open court and an interlocutory decree for an accounting was entered. That decree finds the facts substantially as above stated regarding the unsuccessful attempt made to organize the corporation; that the payments made on the stock subscriptions constituted a trust fund for the use of the subscribers from whom it was collected, and that when the attempted organization was abandoned by plaintiffs in error, they became trustees of the fund and accountable as such to the subscribers; that all of the amounts received upon the stock subscriptions by plaintiffs in error, except the amount recovered by the receiver, had been expended, and that certain portions thereof were "improperly and unlawfully dissipated" by the nine corporators "by and through their fiscal agent, Max Spiegel;" that the cause be referred to a master in chancery for an accounting; that notice be given to all subscribers to file their claims within a

110 A. I. 42

DECEMBER 1910
SOUTH COUNTY

RECEIVED AT NEW YORK
DECEMBER 1910

RECEIVED AT NEW YORK
DECEMBER 1910

THE NEW YORK STATE DEPARTMENT OF TAXES

On this 1st day of May 1911 it is hereby ordered that the
following schedule is hereby set to a certain and
of money collected by the New York State Department of Taxes
and of a separate life insurance company which they were
fully attempted to organize.

In January, 1910, one of the few schedules in error
showed a deficiency in intention to form such a corporation under
the laws of Illinois, filed it with the insurance department,
and were with intention to form such a corporation for the

capital stock of a corporation to be known as the "Illinois Life
Insurance Company," with a capital of \$500,000, divided into 10,000
shares of the par value of \$50 each. Thereupon, the same company
was organized and the same was filed in the New York State
Department of Taxes, which the department

was notified in regard to the same, and the same was
and the same collection of money was in the New York State
the capital stock, which was to be "delivered from the
outlets on shares sold," and that "the proceeds of the same"

It should be noted that a collection of money was made, in the
and the same was notified in the New York State Department of Taxes
in the New York State Department of Taxes, which the department

solicited subscriptions to the capital stock of the proposed corporation, and collected payments thereon aggregating \$37,800. The organization was never completed. The attempt to organize it was definitely abandoned in June, 1918, and at that time, upon a bill filed by H. Johnson, one of the plaintiffs in error, against the others, alleging that all the amounts collected were trust funds, a receiver was appointed to take charge of what remained of them. The receiver's total receipts were \$6035.35, including \$3720.57 collected as the result of a foreclosure decree, which was affirmed by this court in Spiegel v. Solperg, 226 Ill. App. 446.

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[illegible]

specified time, and for a hearing by the master upon all claims to which objections might be filed. Plaintiffs in error prayed an appeal from this interlocutory decree, which was denied. The master made a report, giving the names of all subscribers who had proved their claims and the amounts thereof, aggregating \$25,150, and recommended that a decree be entered requiring that amount, together with interest, costs and solicitors' fees and expenses, to be paid to the receiver by plaintiffs in error. The final decree is substantially in conformity with the master's report.

It is first contended that the record does not show any certificate of evidence supporting the interlocutory decree. While that is true, the decree itself finds the ultimate facts upon which it was based, and that is sufficient. (Rybakowicz v. Rybakowicz, 290 Ill. 550.)

It is next insisted that no trust is involved, that each of the subscribers has an adequate remedy at law against plaintiffs in error, and that the bill is multifarious. These objections may be considered together. It is apparent from the findings of fact made in the preliminary decree, that plaintiffs in error were promoters of the proposed corporation, and the rule is well settled that such persons occupy a relation of trust and confidence to the proposed company (Bickerman v. Northern Trust Co., 176 U. S. 181, 204), and also towards persons who on their invitation or solicitation subscribe for stock in the corporation which they are in the act of creating. (1 Thompson on Corporations, § 103; Mason v. Carrothers, 105 Me. 392; Hayward v. Leeson, 176 Mass. 310; 14 Corpus Juris 253, § 285.) In Lang v. Blocki, 286 Ill. 91, 95, it was held that whether the money of the subscribers to capital stock can be used by corporators for expenses of trying to sell stock to others, and for rent, clerk hire and other expenses of the corporators, must be determined by the provisions of the statute, and

agreed that, and for a meeting by the master upon his return
to which objection might be raised. Plaintiff in error moved
an appeal from this information before, which was denied. The
master made a report, giving the names of all respondents who
had proved their claim and the amount claimed, aggregating
\$25,000, and recommended that a decree be entered reciting these
amounts, together with interest, costs and collection fees and
expenses, as he paid to the receiver by plaintiff in error. The
final decree is substantially in conformity with the master's
report.

It is first contended that the record does not show any
detriment to evidence supporting the information before. While
that is true, the record itself shows the plaintiff in error
it was proved, and that is sufficient. (Henderson v. Henderson,
200 Ill. 501.)

It is next insisted that no fraud is involved, that none
of the respondents has an adequate remedy in the equity jurisdiction
in error, and that the bill is multiplicitious. These objections may
be considered separately. It is apparent from the findings of fact

made in the preliminary decree, that plaintiff in error was
a partner in the proposed corporation, and his wife in sole and
that and partners equity is satisfied it could not maintain in the
proposed company (Henderson v. Henderson, 200 Ill. 501, 502,
503), and also because partners are in their position as partners
also affected by stock in the corporation which they are in the
act of receiving. (Henderson on corporations, 2 200; Henderson v.

Henderson, 200 Ill. 501, 502, 503; Henderson v. Henderson, 200 Ill. 501,
502, 503; Henderson v. Henderson, 200 Ill. 501, 502, 503, 504,
505 and 506.) The plaintiff in error, by the admission in his bill, that
and that the equity jurisdiction is not adequate to afford relief in
this case, and for such other relief and other purposes as the law
may require, and for such other relief and other purposes as the law

that the act providing for the organization and regulation of life insurance companies requires that the entire amount of capital stock shall be subscribed and paid for and shall remain as the capital of the company, and "gives no warrant for the expenditure of money subscribed for capital stock in payment of expenses incurred by corporators in the attempt to form a corporation." There is a suggestion in the record that some of the stock subscriptions that were taken authorized the use of the subscription money for the purpose of paying such expenses, but the master's report and final decree show that no such agreement was made with any of the sixty-nine subscribers whose claims were proved before the master or included in the amount required by the decree to be paid by plaintiffs in error to the receiver. It follows, we think, that the whole amount collected upon the stock subscriptions of subscribers who proved their claims in this case constituted a trust fund, and plaintiffs in error are chargeable therewith as trustees. While each of such subscribers no doubt could have recovered a judgment against plaintiffs in error for the amount of his subscription, as was done in Brinkwater v. Spiegel, 218 Ill. 637, yet, because of the trust relation existing between plaintiffs in error and the subscribers, there was a more adequate remedy in equity available to all the subscribers. It follows also, that the bill was not multifarious for the reasons stated.

It is urged that no interest upon the amounts paid by the subscribers could properly be allowed. The contrary was held in Gelden v. Cervenka, 278 Ill. 406, where it is said (p. 435) that "in equity, interest is allowed because of equitable considerations, and is given or withheld as, under all circumstances of the case, seems equitable and just." Plaintiffs in error having received funds which belonged to the subscribers, and having retained the same without authority of law, are liable for interest thereon from

that the act of transferring the property to the company is

the insurance company's business and the company is not to be

of the capital of the company, and "gives no return for the

organization of money invested for capital stock in payment of

expenses incurred by the company in the attempt to form a corporation."

These statements that were taken out of the act of the

legislation must be taken into account in the construction of the

the master's and final decree show that no such agreement

was made with the company, and the company is not to be

of the capital of the company, and "gives no return for the

organization of money invested for capital stock in payment of

expenses incurred by the company in the attempt to form a corporation."

These statements that were taken out of the act of the

the master's and final decree show that no such agreement

was made with the company, and the company is not to be

of the capital of the company, and "gives no return for the

organization of money invested for capital stock in payment of

the time a demand was made for payment, which was when the cross-bills were filed. (Ibid. 433.) The same principle is recognized in Lehsan v. Rothbarth, 159 Ill. 270.

While the allowance of solicitors' fees and expenses is assigned an error, the alleged error is not argued or mentioned in the briefs of counsel. It must therefore be considered as waived.

It is finally urged that no proper proof was made of the claims of the subscribers. The record shows that each of the subscribers submitted a sworn statement of the amount paid by him or her upon stock subscriptions, and that this claim was verified by comparison with the books of plaintiffs in error, which were in the hands of the receiver and offered in evidence. We think this was sufficient to sustain the decree, in the absence of any countervailing evidence.

Finding no reversible error in the decree, it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

73 - 30325

IN RE ESTATE OF
JOHN F. DADIE, deceased,

WILLIAM J. MOXLEY, Inc.,
a corporation,
Appellant,

v.

GERTRUDE A. DADIE,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 612

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court allowing the claim of William J. Moxley, Inc., an Illinois corporation, against the estate of John F. Dadie, deceased, for \$2729.79, which amount is nearly \$10,000 less than appellant claims to be due.

John F. Dadie died in October, 1915. For many years before his death, he was an employee of the appellant corporation, and during the last year of his life was its president. All the capital stock of the corporation was owned by William J. Moxley, and one of Moxley's daughters was Dadie's second wife. When Dadie died, George Moxley, a son of William J. Moxley, became the president of the corporation and the administrator of Dadie's estate. The corporation filed in the Probate court a claim against the estate "for overdrafts and money advanced to John Francis Dadie, deceased, at his request, from July 1, A. D. 1911, to October 12, A. D. 1916, \$13,477.45." After a hearing thereon, in which Gertrude A. Dadie, the daughter of the decedent by his first marriage, was represented by counsel, an order was entered allowing the claim for \$11,456.50, from which order Gertrude A. Dadie prayed and was allowed an appeal to the Circuit court of Cook County upon giving a bond for \$250 within twenty days. Within

the time limited, her bond in that amount was approved by the Probate court. The transcript shows that the bond bears the "O. K." of the present attorneys for appellant.

In the Circuit court, an order was entered referring the claim to a referee, as provided by section 68 of the Practice Act. An extended hearing was had before the referee and he made a report finding that the estate was indebted to the corporation, first, "for monies paid out for John F. Dadie, individually, \$1426.61;" second, "for monies paid out for Jackson Street lot, \$694.28;" and third, "for monies paid to or for Mrs. John F. Dadie, \$9653.57." The Jackson street lot thus referred to was a piece of property jointly owned by Mr. and Mrs. Dadie. Exceptions to this report were filed by Gertrude A. Dadie, and a jury trial thereon was demanded by her, but the Circuit court proceeded to hear the case as a chancery suit and to determine the issues without calling a jury. A decree was entered approving the referee's report, which decree, on Gertrude A. Dadie's appeal to this court, was reversed and the cause remanded, mainly on the authority of Continental Beer Pump & Plumbing Co. v. George J. Cooke Co., 289 Ill. 104, because of the error of the court in refusing a jury trial on the exceptions filed to the referee's report. (Dadie v. Moxley, 325 Ill. App. 374.)

Upon the remandment of the cause, a jury trial was had in the Circuit court. Upon that trial, no question was raised as to the first two items of the claim as reported by the referee. The only issue presented to the jury was upon the exceptions filed to the third item above quoted. The jury returned a verdict allowing the claim for the amount of the first two items, only, with interest, and from a judgment entered on that verdict, this appeal was perfected.

Appellant first contends that the Circuit court erred in denying its motion, made in that court, to dismiss the

U. S. S. of the present company for a long time.

姓名: 王德明 性别: 男 年龄: 45 民族: 汉族 籍贯: 山东省潍坊市 职业: 教师 学历: 本科 学位: 硕士 职称: 副教授 工作单位: 潍坊市第一中学 联系电话: 0536-2345678 电子邮箱: wangdeming@wzy.edu.cn

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appeal from the Probate court, for the reason, as is claimed, that Gertrude A. Dadie had no right to appeal. The argument on this point is that section 68 of the Administration Act is the only provision for an appeal from an order of the Probate court allowing or rejecting a claim; that by the terms of that section the right of appeal is given to "either party;" that Gertrude A. Dadie is not such a party, and that the administrator, the "proper party," did not appeal.

Section 124 of the Administration Act gives the right of appeal from the Probate court to the Circuit court to "any person who may consider himself aggrieved by any judgment, order or decree of such court," and by the terms of that section it applies "in all matters arising under this act." Appellant insists that this section does not apply here because it is general in its terms, while section 68 refers specially to the allowance of claims. Conceding this to be true in ordinary cases, it does not follow that Gertrude A. Dadie was not a "party" to the order of the Probate court allowing the claim. Ordinarily, the parties to a proceeding in the Probate court for the allowance of a claim are the claimant on the one side and the administrator on the other. In this case, however, George Moxley testified that after the claim was filed in the Probate court, he filed a petition asking that "some lawyer be appointed to defend the estate against this claim," whereupon "Mr. Meads was appointed." Mr. Meads was and is the attorney for Gertrude A. Dadie, the sole heir at law. Thereafter, Gertrude A. Dadie was treated and recognized as the real party in interest in the Probate court, in the Circuit court, and in this court upon the former appeal. Because of the conflicting personal interest of the administrator, she was, in fact, the only person interested in resisting the claim of the corporation against the estate of the deceased. Under the circumstances, we think, she had the right to appeal from the decision of the

appeal from the Probate court, for the reason, as is claimed,
that George A. Hodge had no right to appeal. The argument
on this point is that section 10 of the administration act is
the only provision for an appeal from an order of the Probate
court allowing or rejecting a claim; that by the terms of that
section the right of appeal is given to "either party;" that
George A. Hodge is not such a party, and that the administrator,
the "proper party," did not appeal.
Section 10 of the administration act gives the right
of appeal from the Probate court to the district court to "any
person who may consider himself aggrieved by any judgment, order
or decree of such court," and by the terms of that section it
appears "in all matters arising under this act." Apparently the
fact that this section does not apply here because it is general in its
terms, while section 10 refers specifically to the allowance of claims,
limiting this to be true in ordinary cases, it does not follow
that George A. Hodge was not a "party" to the order of the
Probate court allowing the claim. Ordinarily, the parties to a
proceeding in the Probate court for the allowance of a claim are
the claimant on the one side and the administrator on the other.
In this case, however, George Haskins testified that after the
claim was filed in the Probate court, he filed a petition asking
that "said paper be rejected as being the estate against this
claim," and that "Mr. Hodge was appointed." Mr. Hodge was and
is the attorney for George A. Hodge, the sole heir at law.
Thereafter, George A. Hodge was tested and recognized as the
real party in interest in the Probate court, in the district court,
and in this court upon the former appeal. Because of the same
ill-timed personal interest of the administrator, who was, in 1906,
the sole person interested in rejecting the claim of the respondent,
against the estate of the deceased. Under the circumstances,

Probate court, whether she be considered as a "party," under section 68 of the Administration Act, or as "a person aggrieved," under section 124 of that act.

Objections are also made to the form and some of the terms of the same appeal bond. We must assume that if these objections had been called to the attention of the Circuit court, it would have required a sufficient bond to be filed. They are objections that might have been cured by giving a new bond, if requested in apt time. Having made no such request, and having in fact marked the bond "O.K." before its approval, we think appellant is not now in a position to complain of these matters.

It is next urged that the exception to the referee's report was not sufficient to raise any issue for a jury trial. This relates merely to the form of the exception. As filed, the exception specifically excepts to that part of the referee's report concerning "moneys paid out to or for Mrs. John F. Dadie * * and totaling the sum of \$9653.57," and then alleges that there is no proof that this amount "was indebtedness due from John F. Dadie, deceased, or the estate of John F. Dadie, deceased, to said Em. J. Moxley, Incorporated." The contention is that this language tenders no issue of fact, but merely raises the question whether sufficient proof was made before the referee to justify his finding. The same contention was, or might have been, urged in the former appeal, and was necessarily disposed of by the former decision. When the purpose of such exception and the demand for a jury trial thereon are considered in connection with the procedure outlined in section 68 of the Practice Act, we think it is clear that the meaning and intention of the exception was to raise an issue of fact as to whether the item objected to was a debt of John F. Dadie or of his wife. That was, in fact, the issue tried, and upon which the verdict was rendered.

Upon the merits, appellant contends that there is no

Exhibit number, whether it be considered as a "copy," under
section 33 of the Administration Act, or as a "person signature,"
under section 34 of that act.

Objections are also made to the form and name of the
form of the same signed bond. It must appear that it is
objection has been taken to the signature of the person named,
it would have required a sufficient bond to be filed. They are
objections that might have been made by giving a new bond. It
appeared in the form. Having made no such request, and having
in fact signed the bond "J.K." before the recovery, we think
objection is not now in a position to compel of these matters.
It is next urged that the exception to the reference
regards was not sufficient to raise any issue for a jury trial.
This relates merely to the form of the exception. It filed, the
exception specifically excepts to that part of the referee's report
concerning "money paid out to or for Mrs. John F. Bodie" and
relating the sum of \$4451.37, and then alleges that there is no
evidence that this amount "was indebtedness due from John F. Bodie,"
and that the estate of John F. Bodie, deceased, so said Mrs. F.
Bodie, Incorporated. The contention is that this language forbids
us from at first, but merely raises the question whether sufficient
evidence was made before the referee to justify his finding. The same
contention was, or might have been, urged in the former appeal, and
was successfully disposed of by the former decision. When the
purpose of such exception was to raise for a jury trial issues
and questions of law, it is manifest that the previous finding is binding
on the parties, and we think it is clear that the same was
submitted to the referee and in view of issue at first as to
whether the sum stated in the report of John F. Bodie, as at the
all. That was, in fact, the issue raised, and when raised the same
shall not be repeated.

evidence tending to overcome the prima facie effect of the referee's findings as to the items in controversy. After a prima facie case had been made under section 68 of the Practice Act by introducing the referee's report and properly excluding, as we think, the transcript of the evidence taken before the referee, appellant rested. Thereupon, appellee introduced an old account book which was identified as "Mr. Moxley's personal ledger." In it there was an account with "Miss M. Moxley," beginning in April, 1891. The bookkeeper testified that this referred to the daughter of William J. Moxley who afterwards married John F. Dadie; that the account was begun by Mr. Moxley "when he was an individual, and when he was a corporation it went on just the same, no change in the account," except that when Miss Moxley was married the bookkeeper wrote above her name on the account the words "Mrs. J. Dadie." Sundry pages from appellant's later ledgers were also introduced. The bookkeeper was then called, and testified that after the marriage he was directed by John F. Dadie to credit his wife's account with an allowance of \$120 a month (which allowance was later increased to \$125 a month) and to charge the same to his account. Her account shows that from 1893 to 1901 Mrs. Dadie apparently overdrew her account \$3545, and on December 31, 1900, that amount was charged to John Dadie's account by direction of William J. Moxley, and her account was discontinued. The book shows that for ever ten years thereafter all amounts paid by the corporation for Mrs. Dadie's benefit were charged to the account of John Dadie. His account was credited with the salary due him, beginning at \$300 and increasing to \$500 a month, and in July, 1911, there was a debit balance of nearly \$20,000 shown in his account. At that time the system of keeping the books of the corporation was changed and a loose leaf ledger was opened. In this ledger three accounts are shown, one against John Dadie, another against

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...in this ledger there ...
...against John ...

Mrs. Dadie, and a third against the Jackson street lot. These accounts do not begin with any balance brought forward from the other books or accounts. What was done with the balance of nearly \$20,000 apparently due from John Dadie at that time, as shown by the old books, does not appear from the evidence. These facts had a tendency, at least, to show that in 1911 whatever claim the corporation may have had against the deceased on account of payments made by the corporation for the benefit of Mrs. Dadie, was cancelled or abandoned. All of the items entering into the amount in controversy were thereafter charged, on the books of the corporation, not against the deceased, but against Mrs. Dadie personally, and an examination of the loose leaf ledger sheets introduced in evidence by appellee shows that none of these items was charged or transferred to the account of the deceased at any time. The deceased was apparently a man of small means, dependent to a large extent, if not entirely, upon the salary he received from the corporation, yet, during the last four years of his life, his wife received from the corporation owned by her father, nearly \$10,000. The jury apparently found from all this evidence that it was more reasonable to conclude that Mrs. Dadie's father was paying some of her bills for personal wearing apparel, etc., than that the deceased was a defaulter. We think the evidence justifies the conclusion.

Other minor contentions are made regarding rulings of the court at the trial and as to instructions. We have considered these contentions and think they are without merit.

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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ELASP & SHAKE OLIER,
a corporation,

Defendant in Error,

v.

E. J. GILMORE et al.,
ILLINOIS KNIGHTS OF KU KLUX KLAN
and THE KNIGHTS OF THE KU KLUX KLAN,
Incorporated,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 612

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court to recover \$1201.10, which defendants are alleged to have fraudulently obtained from a bank, in which the money was deposited, ^{by} representing to the bank that they were authorized to withdraw it. Defendants' affidavit of merits was stricken from the files and for want of an affidavit of merits they were defaulted and judgment was entered against them upon the plaintiffs' statement of claim.

The only errors assigned question this action of the trial court, and there is no bill of exceptions in the record.

The rule is well settled that such action of the court cannot be considered unless the motion and the ruling thereon are presented by a bill of exceptions, so that the error, if any, may appear from the record. Such motions are not properly a part of the common law record, and unless made so by a proper bill of exceptions, it will be presumed, on appeal or writ of error, that the action of the court in striking an affidavit of merits, or a pleading, from the record was correct. (Mann v. Brown, 263 Ill. 394; Gaynor v. Hibernia Savings Bank, 166 Ill. 579; Wittman v. Geeske, 200 Ill. App. 108.) Exceptions to this rule have been

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recognized in cases where it appears from something which is part of the record that the affidavit of merits and motion to strike were considered by the trial court as a pleading and a demurrer, respectively. (Harmon v. Callahan, 286 Ill. 59; Cohen v. Flaxman, 232 Ill. App. 242; Citizens' Securities & Investment Co. v. Olson, 234 Ill. App. 554.) In this case no facts appear from the record to show that the motion was treated as a demurrer to a pleading. Therefore the general rule applies.

Accordingly the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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JOHN E. FITZPATRICK,
Plaintiff in Error,

v.

GEORGIA CASUALTY COMPANY,
Defendant in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

241 I.A. 612

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The writ of error is prosecuted from a judgment for defendant rendered on the verdict of a jury, in an action brought on an insurance policy to recover the amount of loss sustained by the plaintiff when his automobile was damaged in a collision. The successful defense was that the policy was obtained by fraud. No brief has been filed by the defendant.

In 1922, Wolfle, Steffelin & Co., general insurance brokers, had an arrangement with defendant under which the brokers received applications for insurance, collected the premiums thereon, sent the details to defendant, who issued the policies, sent them to the brokers and charged the premiums to them, payable, less their commission of twenty-five per cent, on the seventy-fifth day after the policies were issued. One Hall, an insurance solicitor, had a desk in the office of Wolfle, Steffelin & Co.

Plaintiff had a Buick car, the insurance on which expired on October 28, 1922. Before noon of that day, Frank O'Brien, representing the plaintiff, met Hall in a building at the stock yards and told the latter he wanted plaintiff's car insured, and gave him the description, value, motor number, etc., of the car. Hall telephoned to Wolfle, Steffelin & Co., for the exact amount of premium required, and when that was ascertained,

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Journal of Internal Medicine 245: 115-122

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not consider a cost-benefit analysis of value to law.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

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O'Brien gave Hall plaintiff's check for that amount, payable to Welfle, Steffelin & Co., whereupon Hall told O'Brien the car was "covered from now on." That was Saturday forenoon, between ten and eleven o'clock, but the policy was not actually written on that day.

Early the next morning, Sunday, October 29, 1922, plaintiff's car, driven by his son, collided with a truck and was badly damaged. Hall was notified of that fact and on Monday morning, October 30, 1922, he reported it to the assistant manager of the casualty department of Welfle, Steffelin & Co. telling her he had received plaintiff's order for the insurance on the previous Saturday, before the accident. The assistant manager testified that she thereupon telephoned to defendant's manager, and asked him whether, under the circumstances, defendant would issue the policy, to which an affirmative reply was given without hesitation. Defendant's manager testified that he was assured by the manager of Welfle, Steffelin & Co.'s casualty department that the damage to plaintiff's automobile did not exceed \$125, and was also threatened with a withdrawal of the business of that firm unless the policy was issued. This is flatly denied by both the manager and the assistant manager of the casualty department of Welfle, Steffelin & Co. Following this conversation, whatever it was, the policy was issued, dated October 28, 1922, and the premium was charged by defendant to Welfle, Steffelin & Co., who, according to custom, deposited plaintiff's check to their own account. Defendant claims that as soon as it discovered that the loss was very much greater than \$125, it notified both the plaintiff and Welfle, Steffelin & Co. in writing that the policy had been obtained by fraud "and therefore was never in force." Defendant also claims that when, in due course, it received a check for the premium from Welfle, Steffelin & Co. the check was returned to them.

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June 17, 1964

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If any misrepresentations were made to defendant regarding the extent of the loss sustained in the collision, there is no evidence tending to prove that they were made with the knowledge or upon the authority of the plaintiff. If it be assumed that Wolfe, Steffelin & Co., through their solicitor Hall, became the agents of the plaintiff for the purpose of procuring insurance on plaintiff's car, such agency certainly gave them no authority to make false and fraudulent misrepresentations to the defendant, if any were made, regarding a loss which occurred after such agency had terminated. Under the arrangement existing between defendant and Wolfe, Steffelin & Co., payment of the premium to Wolfe, Steffelin & Co. was payment to the defendant. (Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545; National Hotel Co. v. Merchants' Fire Assurance Corp., 183 Ill. App. 71.) They were authorized by defendant to collect such premiums, and in accepting plaintiff's check and "covering" plaintiff's car, they were defendant's agents. Defendant recognized that fact when it dated the policy as of the date when the order was given and the check delivered. Under the evidence, as we understand it, plaintiff was entitled, on the day before the accident, to receive the policy from the defendant; and therefore whatever may have been said thereafter to defendant, by its own agents, to induce it to issue the policy, was wholly immaterial. In this view, the verdict would seem to be manifestly contrary to the material evidence.

Plaintiff also contends that reversible error was committed when the letters written to plaintiff and to Wolfe, Steffelin & Co. after the discovery of the alleged fraud, were admitted in evidence, over plaintiff's objection. These letters were purely self-serving statements, and we are unable to perceive any theory upon which they were admissible.

Complaint is also made of the instructions. Only

It was also stated that the evidence was not sufficient to establish the fact that the loss sustained in the collision, there

is no evidence tending to prove that they were made with the

knowledge or upon the authority of the plaintiff. It is so

stated that the plaintiff, through their authorized

agent, became the agent of the plaintiff for the purpose of procuring

them to authorize to make loans and transactions with respect to the

to the plaintiff, it may be said, regarding a loss which occurred

after such agency had terminated. Under the arrangement existing

between defendant and plaintiff, defendant is so, payment of the

amount to plaintiff, defendant is so, was payment to the defendant.

Plaintiff's check and "covering" plaintiff's own, they were

delivered to defendant to collect such amounts, and in accepting

plaintiff's check and "covering" plaintiff's own, they were

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three were given and those were given at defendant's request. All of them are misleading. All proceed upon the theory that there is some evidence tending to prove that Wolfle, Steffelin & Co. were the agents of the plaintiff in making the alleged misrepresentations to defendant regarding the extent of the damage to plaintiff's automobile. All the evidence on that subject, however, tends to prove the contrary.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Gridley, J., concur.

There are three main types of investment contracts: (1) those which are subject to the jurisdiction of the courts of the host country; (2) those which are subject to the jurisdiction of the courts of the investor's country; and (3) those which are subject to the jurisdiction of an international tribunal. The first type of contract is the most common, but it is also the most subject to dispute. The second type of contract is the least common, but it is also the least subject to dispute. The third type of contract is the most common, but it is also the most subject to dispute.

The second type of contract is the least common, but it is also the least subject to dispute.

The third type of contract is the most common, but it is also the most subject to dispute.

THE SECOND TYPE OF CONTRACT

THE THIRD TYPE OF CONTRACT

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error.

v.

DAVID E. PINK,
Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

241 I.A. 612

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is a writ of error from a judgment of the Municipal court by which the defendant, David E. Pink, was adjudged "guilty of the criminal offense of having intoxicating liquor in his possession." The record shows that the case was tried at the same time as the case of The People v. Masor (No. 29443, opinion filed July 14, 1925), and upon an information identical with the information in that case, so far as it charges the offense stated in the judgment. In the Masor case, supra, we held that the information failed to charge any violation of the Prohibition act, and for the reasons stated in that case the judgment entered in this case as to the same charge cannot stand.

In this case, however, the information charges the defendant not only with the offense of which he was found guilty, but also that he "did sell intoxicating liquors for beverage purposes without a permit;" but while the court found the defendant guilty "as charged in the information," no judgment was entered upon the finding as to the charge of selling intoxicating liquor. This action of the court in rendering judgment for one offense only, after a general finding of guilty, amounted to a discontinuance as to the other offense charged in the information. (The People v. Huyvaert, 209 Ill. App. 40; The People v. Favelli, 222 Ill. App. 518.)

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As the Masser case, supra, disposes of the first charge, and as no judgment can now be entered on the other, the cause will not be remanded.

JUDGMENT REVERSED.

Barnes, F. J., and Gridley, J., concur.

As the first thing I did when I came to the
 office, I was told that the first thing I should do
 was to go to the bank and get some money.
 I did so, and then I went to the office.

When I got to the office, I found that the first thing I should do was to go to the bank and get some money.

138 - 30397

RICHARD A. PICK,
Plaintiff,

v.

MARTIN HEYMAN,
Defendant,

and

STATE MUTUAL LIFE ASSURANCE
COMPANY OF WORCESTER,
MASSACHUSETTS, a corporation,
Garnishee.

WRIT TO

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 613

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Richard A. Pick brought an attachment suit in the Municipal court against Martin Heyman, a resident of California, for money due on notes given for premiums on three life insurance policies. The insurance company was summoned as garnishee, and filed its sworn answer stating that it had no goods, credits or effects in its possession belonging to Heyman. Heyman did not appear and upon proof of service by publication a judgment by default was entered against him for \$280.

In the transcript of the record, the clerk of the Municipal court certifies that thereafter "a certain amended answer" was filed, and a copy of it is inserted. On its face, the document so referred to does not purport to be an amended answer. It purports to be a letter written by Everts Brown, general agent of the insurance company in Chicago, to plaintiff's attorneys, dated June 6, 1925, which states, in substance, that Martin Heyman has three policies in the State Mutual Life Assurance Company for \$5000, \$5000 and \$4000, respectively, all dated February 28, 1922, that the premiums on all of them were paid up to August 28, 1925; and that such policies have cash values, "as of August 28, 1925," aggregating \$895, against which there are "premium loans" aggregating \$479.20 and interest.

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Abstract

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The transcript then shows that on the same day this letter was filed in the Municipal court, "this cause coming on for further proceedings herein," a judgment was entered "on the answer of the garnishee" against it for \$406. The order does not state who, if anyone, was present in court when it was entered, and does not state that any trial was had or any evidence heard. X

More than thirty days after that judgment was entered, the garnishee filed a motion to vacate it and to strike from the files "the purported amended answer," supported by the verified petition of the garnishee, stating that the letter written to plaintiff's attorneys was not written or intended as an answer of the garnishee in the attachment proceeding, but was written in answer to a request for information made by plaintiff's attorneys; that plaintiff's attorneys were not authorized to file the letter as an answer or amended answer of the garnishee; that the answer of the garnishee previously filed was the true and correct answer of the garnishee and had not been disproved or contested at the time of the entry of the judgment, and that the cash value of the life insurance policies issued by the garnishee is not subject to garnishment. These motions and petition were denied, and the garnishee prayed, was allowed, and perfected an appeal to this court. Later, a writ of error from the judgment was sued out and the appeal and the writ of error were consolidated. No briefs have been filed on behalf of the plaintiff.

We are of the opinion that the letter from the general agent of the garnishee to the plaintiff's attorneys should have been stricken from the files on the motion of the garnishee. It cannot be construed or treated as in any sense an "amended answer" of the garnishee, and the label given to it by the clerk of the Municipal court does not make it an amended answer. There is nothing in or about it tending to show that it was intended as an

The transcript shows that on the same day this
order was filed in the criminal court. "This order coming on
the further proceedings herein," a judgment was entered "on the
motion of the defendant" against it for \$1000. The order does
not state who it was, and present in court when it was
entered, and does not state that any trial was had or any other
thing heard.

Now then thirty days after that judgment was entered,
the defendant filed a motion to vacate it and to set aside from the
file "the purported amended answer," supported by the verified
petition at the hearing, stating that the latter witness to
plaintiff's attorney was not within or intended to be within
at the time in the defendant's proceeding, but was within in
answer to a request for information made by plaintiff's attorney;
that plaintiff's attorney was not authorized to file the latter
as an answer or amended answer to the petition; that the answer
at the hearing was not then and there and occurred merely
at the hearing and was not then approved or accepted at the
time of the filing of the petition, and that the same was not
filed in compliance with the provisions of the statute in any respect to
compliance. These motions and petition were denied, and the
proceedings were allowed, and continued on appeal to this
court. Later, a writ of habeas corpus was granted and the
petition and the writ of habeas corpus were dismissed. The court
then said that in view of the plaintiff.

We are of the opinion that the latter from the general
order of the court in the plaintiff's case should have
been set aside from the file and the latter should be
correctly amended or amended to in any manner as amended answer
of the plaintiff, and the latter given to it by the clerk of the
court.

answer or amendment to the answer to the attachment. It was not filed by the garnishee or by anyone acting for it in its behalf or by its authority. The use made of it by plaintiff's attorneys appears to have been unauthorized, unwarranted and wholly indefensible from any point of view.

But apart from such considerations, which should have been sufficient to cause the trial court to strike the document from the record, there is nothing in the letter which amends, modifies, traverses or contradicts any statement contained in the sworn answer of the garnishee properly on file, or which affords any basis whatever for a finding that the garnishee was indebted to Heyman in any amount at any time. The law is well settled in this state that in garnishment proceedings the creditor can recover only such indebtedness as his debtor might recover in his own name in an action at law (May v. Baker, 13 Ill. 89; Webster v. Steele, 75 Ill. 544; Capes v. Burgess, 135 Ill. 61; Ryan v. Kimberley, 118 Ill. App. 361, 368; Independent Filter Co. v. Hilbig, 163 Ill. App. 16); and such indebtedness must be owing absolutely and subject to no contingency at the time the answer of the garnishee is filed (Pressed Steel Equipment Co. v. Thornburgh Presteel Co., 228 Ill. App. 1 - affirmed on other grounds in 312 Ill. 359.)

The policies are not in the record, and the record shows that they were not before the court at the time judgment was rendered. Hence, the only possible inference the court could draw, from the evidence of the letter alone, - if that was considered as an "amended answer" - was that the insurance policies had the cash values stated in the letter in case they were surrendered or cancelled on August 28, 1925. There is no statement in the letter, however, that the Heyman policies had been or were to be surrendered or cancelled at any time. The letter merely states that premiums had been paid on the policies up to August 28, 1925 - two months

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beyond the date of the letter. Hence, it appears from the letter that while the policies had stipulated or computable cash values in case the policies were surrendered or cancelled, such values were wholly contingent upon the surrender or cancellation of the policies to the insurance company at the time stated.

Moreover, as the record states that the judgment was rendered "on the answer of the garnishee," it must be assumed that the court was not informed as to the name of the beneficiary. If the insurance was payable to anyone but the administrator or executor of the insured, the policies could not be surrendered or cancelled without the consent of the beneficiary, and in case of surrender or cancellation the cash value would belong to the beneficiary, even as against the insured (37 Corpus Juris 444, § 161,) and no action at law by the insured would lie to recover such cash value unless such consent of the beneficiary were alleged and proved. (Haskell v. Equitable Life Insurance Society, 181 Mass. 341.)

It seems clear, therefore, not only that the so-called amended answer should have been stricken from the files upon the motion of the garnishee, but that the action to vacate the judgment should have been allowed and the judgment should have been vacated. The petition of the garnishee, though filed more than thirty days after the date of the judgment, would have been sufficient in a court of equity to justify such relief, and therefore the Municipal court under section 21 of the Municipal court act, had jurisdiction at that time to vacate the judgment.

Upon the writ of error, the judgment is clearly erroneous for the reasons above stated. Upon the record as it stands, the judgment should have been in favor of, instead of against, the garnishee, and as the error in this respect is one of law and not

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off shore of northern and central Japan, including the

CONFIDENTIAL - SECURITY INFORMATION

These three are the only ones that are not in the same family as the others.

THE UNIVERSITY OF CHICAGO PRESS

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100-443887-100

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THE UNIVERSITY OF CHICAGO PRESS

of fact, the judgment will be reversed and the cause will not be remanded.

JUDGMENT REVERSED.

Barnes, F. J., and Gridley, J., concur.

THE FIRST OF THESE TWO METHODS IS THE MOST COMMON AND THE MOST EASY TO FOLLOW.

THE SECOND IS THE MOST DIFFICULT AND THE MOST COMPLICATED.

THE FIRST METHOD IS THE MOST COMMON AND THE MOST EASY TO FOLLOW.

THE SECOND METHOD IS THE MOST DIFFICULT AND THE MOST COMPLICATED.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

v.

LOUIS BERNSTEIN,
Plaintiff in Error.

} ERROR TO MUNICIPAL COURT
OF CHICAGO.

241 I.A. 613

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

On a trial without a jury defendant was found guilty of pandering and sentenced to six months' confinement in the House of Correction and to pay a fine of \$300 and costs. Thereupon, he sued out this writ of error.

Defendant's main contention is that the finding is against the weight of the evidence. The transcript shows that defendant was convicted upon the uncorroborated testimony of a woman who was employed by him as a maid in one of his rooming houses, and the material parts of her testimony were categorically denied by the defendant. After reviewing the evidence, the majority of the court, of whom the writer is not one, are of the opinion that the alleged offense was not proved beyond a reasonable doubt.

It is also contended that in such cases it must be alleged and proved that the place where the offense, if any, was committed was one in which prostitution was practiced, encouraged or allowed, and that the woman was there for the purpose of prostitution. The contention is without merit. It is sufficient, under the statute defining the offense of pandering, to allege and prove that the defendant "knowingly and without lawful consideration" took, accepted or received "any money or other thing of value from any female person from the earnings of her prostitution," and this was alleged, and there was testimony tending to prove it.

The judgment is reversed and the cause remanded.
REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

2411 A. 218

MR. JUSTICE KIRCH DELIVERED THE OPINION OF THE COURT.

On a trial without a jury defendant was found guilty of
harboring and sentenced to six months' confinement in the House of
Correction and to pay a fine of \$500 and costs. Thompson, the
husband and wife of error.

Defendant's main contention is that the finding is against
the weight of the evidence. The transcript shows that defendant
was convicted upon the uncorroborated testimony of a woman who was
employed by him as a maid in one of his rooming houses, and the
material parts of her testimony were categorically denied by the
defendant. After reviewing the evidence, the majority of the court,
at whom the writer is not one, are of the opinion that the alleged
evidence was not proved beyond a reasonable doubt.

It is also contended that in such cases it must be alleged
and proved that the place where the offense, if any, was committed
was one in which prostitution was practiced, encouraged or allowed,
and that the woman was there for the purpose of prostitution. The
evidence is almost null. It is sufficient, under the statute
defining the offense of harboring, to allege and prove that the
defendant "knowingly and without lawful consideration" took, received
or received "any money or other thing of value from any female person
for the purpose of her prostitution," and this was alleged, and
there was testimony tending to prove it.

The judgment is reversed and the case remanded.
REVEREND AND HONORABLE

James L. L. and William L. ...

16 - 30239

S. R. RUBY,

Plaintiff in Error,

v.

ANAKIN LOCK & ALARM CO.,

a corporation,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 613

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On May 13, 1924, plaintiff commenced a first class action in assumpsit in said Municipal court to recover back from defendant the principal sum of \$1,000, and accrued interest, which sum he had paid to or deposited with defendant, on June 30, 1923, in accordance with the terms of a written contract on that day executed by the parties. His second amended statement of claim was, on motion of defendant, stricken from the files, and, upon his electing to stand by it, the court, on January 23, 1925, entered judgment against him for costs, which judgment by this writ of error he seeks to reverse.

It appears from the contract, made a part of the statement of claim, that plaintiff (Ruby) was a resident of Philadelphia, Pa., and defendant was a corporation, with principal office at Chicago, Illinois, selling its products, known as "Anakin Locks and Alarms." The contract provides that the Company "hereby engages said Ruby to establish and carry on a subsidiary business for the sale of its products," in Philadelphia, Pa., and adjacent territory, "during the period of three years from and after August 1st, 1923, subject to the following terms and conditions:" Then follow at length various terms and conditions, some of which are that "the Company shall bill said products to Ruby at the special net price of 30% off from its regular list price, thereby providing him with full compensation for the services of his salesman;" that "Ruby shall purchase from the Company and pay it for an initial supply of

810.A.112

THE UNITED STATES OF AMERICA

IN SENATE

January 11, 1912

REPORT

OF THE

COMMISSIONER OF THE GENERAL LAND OFFICE

TO THE SENATE

IN RESPONSE TO A RESOLUTION PASSED MAY 1, 1909

RELATIVE TO THE LANDS BELONGING TO THE UNITED STATES

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1912

Price, 10 cents

For sale by the Superintendent of Documents, Washington, D.C.

Accepted for mailing at special rate of postage provided for in Act of October 3, 1917, authorized on July 11, 1918.

forty-five hundred dollars' worth of its products, at said special net price, as follows: \$1,000 to be paid down at the signing hereof, and the balance of \$3,500 to be paid on or before August 1, 1933. - said \$1,000 to be regarded as earnest money which shall be forfeited to the Company as liquidated damages in case of failure by Ruby to pay the remaining \$3,500;" that Ruby thereafter, during the period of the contract, "shall keep on hand and own at least forty-five hundred dollars' worth of said products as demonstrating or working stock to show prospective customers and from which to fill orders;" that, as sales are made from time to time from said stock, the money from the sales (to the amount of said special net price) shall be sent to the Company, "which shall thereupon make additional shipments, as ordered by said Ruby, to replace the amount of stock sold;" that "Ruby's compensation shall consist of \$350 per month, and all necessary expenses of carrying on his said business, together with an extra 10% of the net receipts from all sales made during the month by him and his salesmen in excess of the agreed minimum of \$2,000 per month, at said special net price;" that "Ruby shall devote himself exclusively to the business of selling and furthering the sale of said products as furnished to him by the Company;" that, "at the end of each month's business" he shall make to the Company a full report of the sales and expenses, accompanying the report with remittances; that in case Ruby's business be so unsuccessfully conducted that his sales "do not amount to an average minimum of at least \$2,000 per month, at said special net price, then the Company reserves the right to terminate this agreement and purchase Ruby's stock of said products then on hand, and pay him for same the price he originally paid the company for it and appoint his successor;" that the Company will not exercise its right to terminate this agreement "until Ruby has had a year in which to demonstrate his ability;" and that at the expiration of the three year period of this contract Ruby shall

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have the right to renew it, but if he shall prefer not to do so, he shall give to the Company a sixty days' written notice to that effect, and the Company then "shall buy his said stock of said products and shall pay him therefor the price he originally paid it for same."

In his said amended statement of claim plaintiff alleges that the contract was executed on June 30, 1923, and that he on that day, in accordance with its terms, paid to or deposited with defendant the sum of \$1,000; that this sum "was to act as part payment for the delivery by defendant to plaintiff of an initial supply of forty-five hundred dollars' worth of defendants' products", the balance * * to be paid at other times as specified in said agreement;" that defendant "failed to deliver and has not delivered any of its products" to him, and, said delivery not having taken place, there was "a failure of consideration and no obligation was incurred by plaintiff;" that he has repeatedly requested defendant to repay to him the \$1,000, so deposited, but that defendant has refused so to do; that defendant has sustained no damages; and that as to the \$1,000, "paid by plaintiff to defendant and mentioned in the contract as money to be retained by defendant as liquidated damages in the event plaintiff failed to pay an additional \$2500, by August 1, 1923, for certain products which were to be delivered by defendant to plaintiff," and which said \$1,000 has been retained by defendant, said retention "is a forfeiture by way of penalty and does not represent damages either liquidated or unliquidated sustained by defendant."

We think it is apparent from the provisions of the contract that, commencing August 1, 1923, Ruby was to become defendant's agent for the sale of its products in Philadelphia and vicinity, for a period of three years, subject to the right of defendant, after a year's trial, to terminate such business relations in case his sales did not amount to an average minimum of \$2000 per month;

There is no right to know it, but it is a fact that the
the same day to the Government a letter was written to the
1977 and the Government then "shall not be held liable for
Government and shall not be held liable for the same in any way.

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It is a fact that the Government of the United States has been very successful in its efforts to bring about a more equitable distribution of income and wealth in this country. This has been accomplished through a variety of measures, including the establishment of a progressive income tax, the creation of Social Security, and the implementation of various public works programs. These efforts have resulted in a more stable and prosperous society, and have helped to reduce the economic disparities that have long plagued this nation.

that he was to receive as compensation for his services as such selling agent \$350 per month and also to be paid his necessary expenses; and that, in order that he might employ other salesmen and pay them, said products would be billed to him by defendant at a special net price of 30% off from its regular "list" price. If he was to become a selling agent of defendant's products in that locality, commencing August 1, 1923, it was necessary that he should then have some of such products to sell. Accordingly the contract provided that he should at once (June 30, 1923) purchase from defendant \$4500 worth of said products, at said special rate, as an "initial supply." He then paid \$1000 to defendant for said supply and agreed to pay the balance of \$3500 on or before August 1, 1923, - the date when he was to commence acting as selling agent for defendant. The contract further provided that said \$1000, so paid, is "to be regarded as earnest money" and is to be "forfeited" to defendant "as liquidated damages," in case he fails to pay said balance. Notwithstanding this forfeiture clause, and notwithstanding that the contract fails to mention any date when defendant is to deliver to plaintiff at Philadelphia said initial supply of defendant's products, we think it must be construed under all the provisions of the contract, that it was the intention of the parties that such delivery was to be made to plaintiff at Philadelphia on or prior to August 1, 1923, in order that he should then have in his possession defendant's products to sell. Although plaintiff does not allege in his statement of claim why he did not make said additional payment, yet he alleges in substance that no merchandising has been delivered to him, that the consideration for which he had paid down the \$1,000 has failed, that no damages have been suffered by defendant, and that, notwithstanding said forfeiture clause in the contract, the \$1,000 should be returned to him.

The sole question for our determination is whether

The first question for the Commission is whether
 the fact that the defendant was a member of the
 Communist Party at the time of the murder is
 material to the issue of his guilt. The
 answer to this question is that it is not.
 The fact that the defendant was a member of the
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plaintiff's statement of claim on its face, taking into consideration the terms of the contract made a part thereof, states a cause of action for the recovery of said \$1,000, in whole or in part, sufficient to require defendant to plead thereto and to have a trial upon the merits. We think it does, particularly as plaintiff alleges that the consideration, for which he had paid down the \$1,000, has wholly failed and defendant has suffered no damages. In Advance Amusement Co. v. Franke, 266 Ill. 579, 581, in discussing the question whether a sum named in an agreement to secure performance will be treated as liquidated damages or a penalty, it is said:

"While the intention of the parties on this question must be taken into consideration, the language of the contract is not conclusive. The courts of this State, as well as in other jurisdictions, lean towards a construction which excludes the idea of liquidated damages and permits the parties to recover only damages actually sustained. * * This and all other courts seem to agree upon the principle that a stipulated sum will not be allowed as liquidated damages unless it may be fairly allowed as compensation for the breach. * * We have frequently said that courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it will be treated as a penalty and no more than actual damages proved can be recovered. * * In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty." (See, also, Gieseke v. Callerton, 280 Ill. 510, 515.)

Our conclusion is that the judgment of the Municipal court should be reversed and the cause remanded for further proceedings and a trial upon the merits. It is so ordered.

REVERSED AND REMANDED.

Barnes, F. J., and Fitch, J., concur.

plaintiff's statement of claim on the face, taking into account
the terms of the contract made a part thereof, states a
claim of action for the recovery of said \$1,000, in whole or in
part, without on separate statement to show that and to
have a trial upon the merits. We think it does, particularly
as plaintiff alleges that the consideration, for which he had
paid down the \$1,000, has daily failed and defendant has retained
no damages. In the case of V. Thompson, 205 Ill. 545, 551,
in discussing the question whether a contract is an agreement to
transfer property will be treated as liquidated damages or a

penalty, it is said:

"While the intention of the parties on this question
may be known from conversation, the language of the contract
is not unambiguous. The contract of this State, as well as in
every other State, is a contract which contains within itself
the law of liquidated damages and excludes the parties to the
contract from any further remedy. It is this and all other
contracts which are subject to the principle that a stipulated sum
will not be allowed as liquidated damages unless it may be
shown to be an adequate compensation for the breach. It is
therefore not the duty of the court to look to see the nature and
amount of the damages to be paid; and it is
not the duty of the court to see the extent of the plaintiff's
loss. It will be treated as a penalty and no more
than nominal damages proved can be recovered. It is generally
a rule of law in these cases to hold for the non-plaintiff
as an exception, it is considered as a penalty. (See, also,
Thompson v. Thompson, 205 Ill. 545, 551.)

The conclusion is that the contract of the plaintiff is
to be treated and the same awarded for further proceedings
and a trial upon the merits. It is so ordered.
JAMES H. HARRIS, JUDGE.

Witness, my hand and seal, this 1st day of June, 1911.

CLARA E. WALTASTI, administratrix
of the estate of Clara E. Waltasti,
deceased,

Appellant,

v.

McAVOY COMPANY, a corporation,
Appellee.

Appeal from

Circuit Court,

Cook County.

241 I.A. 613

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

In an action on the case, commenced in said Circuit court, for negligently causing, on the afternoon of May 15, 1922, the death of plaintiff's intestate, a little girl about 6 years of age, while playing with other children on certain vacant land, owned by or under the control of defendant, the jury returned a verdict of not guilty and the court entered judgment thereon against plaintiff and this appeal followed. The theory of the action, as disclosed from the three counts of the declaration, was that defendant negligently maintained on the property an attractive nuisance, which proximately caused said death.

Plaintiff, the mother of the little girl, testified in her own behalf and four other witnesses for her. The only witness called by defendant was one Lewis, a shorthand reporter, who testified from his shorthand notes, taken at the time of the coroner's inquest, as to what certain of plaintiff's witnesses then had testified to. At the conclusion of plaintiff's evidence defendant's motion for a directed verdict was denied, but this motion was not renewed at the close of all the evidence. Defendant, by introducing evidence and failing at the close of all the evidence to renew the motion, waived it, and, hence, there is no sufficient basis for defendant's cross-error, here assigned, that the court erred in refusing to direct a verdict in its favor at the close of all the evidence. (Langan v. Egan Fire Escape Co.,

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1913

REPORT
OF THE
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THE LAND OFFICE

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REPORT OF THE COMMISSIONER OF THE LAND OFFICE

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233 Ill. 308, 312; Golf Co. v. Monarch Refrigerator Co., 252 Ill. 491, 501.)

The land is situated at the northeast corner of South Park Avenue and 24th street, Chicago, and, commencing at 24th street and running north, is known as lots Nos. 25, 26, 27 and 28, all facing west on South Park Avenue, a north and south street. The four lots have street numbers, - 25 being No. 2359, and 26 being No. 2357, etc. - and a total frontage of 100 feet (25 feet each), with a depth of 120 feet to an alley. Except for a barn located on the rear of lot 28, near the alley, the entire premises were vacant and unimproved. The first building north of the premises, No. 2347 South Park Avenue, was owned and occupied by defendant in its business of brewing and selling near-beer. Defendant acquired title to lots 25 and 26 (those nearest to 24th street) in November, 1920. About six months or more prior to the occurrence (May 18, 1922) there had been standing on the two lots a three-story, brick apartment building, but it had been torn down and defendant had permitted much of the wrecked material, stones, bricks and plasterings, to remain scattered over the premises. There were also many iron pipes and fences, a hot water tank, and two cement laundry tubs that rested on pieces of boards. These tubs sloped, were wider at the top than at the bottom, and each weighed about 600 pounds. Each was divided into two compartments by a cement partition. As to just where the tubs were located at the time of the occurrence, - whether about 25 feet north of 24th street and about 65 feet east of South Park Avenue, or farther north near the barn in the rear of lot 28 - the evidence is conflicting. It, however, appears that all of the material, including the two tubs, tank, pipes, fences, etc., could easily be seen from both streets, and that the premises were not fenced. Portions of the fences which had enclosed the lots on which the apartment building formerly had stood had been taken down and were scattered over the premises, which were located in a thickly

populated district, where a large number of children lived. It further appears that for several months prior to the occurrence many children of tender years, living in the neighborhood, played at various games in the midst of the wrecked material and in or around the tubs; that some played "store" with the stones, piling them in little room-like formations, and would pretend that they were merchants selling various wares to other children who would walk inside; that other children played "kiddie-car" with the tubs, i.e., some would seat themselves in the compartments and others, standing on the sides, would rock the tubs back and forth, giving those seated inside a "ride"; that on the afternoon in question certain children were playing "kiddie car" with one of the tubs and it was being rocked and finally was toppled over; that at the very time of the movement deceased was standing nearby, or playing, with her elder brother, Joseph, about 8 years old; and the tub struck her, causing her head to come in violent contact with the water tank and she received injuries which caused her death. There was no evidence that defendant ever had made attempts to prevent or warn the children from playing on the premises. It further appears that plaintiff and family resided immediately opposite at the northwest corner of South Park avenue and 24th street, having moved there a few days before the occurrence; that the deceased's elder brother, Joseph, had played on the premises three or four times, but that deceased never before had been on them; that deceased's parents were working people, - the father being a janitor for buildings located nearby, and plaintiff doing housework for others; that they had warned their children not to play on the premises; that earlier in said afternoon plaintiff, having returned from her work, directed deceased, Joseph, and a younger child, Michael, to play in front of the house where the family lived, while she did certain work in their home; and that, although they promised to do so, they afterwards went across the street and upon the premises where other children were playing.

Ordinarily, the question whether children of tender years might reasonably be expected to be attracted to go upon unguarded premises is for the jury to determine. (36 A.L.R., note, p. 76; City of Pekin v. McMahon, 164 Ill. 141, 147, 152; True & True Co. v. Soda, 261 Ill. 315, 318; Stellery v. Cicero Street Ry. Co., 243 Ill. 296, 292; Stedwell v. City of Chicago, 297 Ill. 486, 490; Anderson v. Karstens, 218 Ill. App. 285, 292.) And we think that, under the facts in evidence, it was for the jury, being properly instructed, to say whether defendant was liable to plaintiff on the theory of its having negligently maintained on the premises an attractive nuisance, which proximately caused the death of the little girl. It was essential that the jury should be given accurate and not misleading instructions.

Among the points urged by plaintiff's counsel for a reversal of the judgment are that the trial court erred in giving to the jury certain instructions offered by defendant, and in refusing certain others offered by plaintiff. Twenty-seven instructions were given - ten being offered by plaintiff and seventeen by defendant. Of those offered by defendant seven directed a verdict for it. Four instructions offered by plaintiff were refused. Given instruction No. 28, offered by defendant, is as follows:

"The jury are instructed that the mere fact that the defendant has placed no witnesses upon the stand except the coroner's reporter should not be taken by you as any indication that the defendant is liable for damages for the death of plaintiff's decedent. The burden of proof is upon the plaintiff and she must prove the material allegations of her declaration, or some count thereof, by the preponderance or greater weight of the evidence before she can recover. If you find that the plaintiff has not proved the material allegations of her declaration, or some count thereof, by a preponderance or greater weight of the evidence, or if you find that the evidence is evenly balanced so that you are in doubt or unable to say which side has the preponderance of the evidence, or if the evidence preponderates in favor of the defendant, then in either of said events the plaintiff cannot recover and you should find the defendant not guilty."

We think it was error to give this instruction. Defendant's

counsel admit in their printed brief here filed that it may be "technically defective," but that in view of other given instructions it was not prejudicial. We cannot agree. The instruction directed a verdict and in no other were the jury told what were the material allegations of the declaration. They were left to speculate, or to decide as a matter of law, as to what were the material allegations, and such an instruction has repeatedly been considered as ground for reversal. (City of Fairbury v. Barnes, 228 Ill. App. 389, 393; Laughlin v. Hopkinson, 292 Ill. 86, 88; Bernier v. Illinois Central R. Co., 296 Ill. 464, 473.)

In given instruction No. 26, offered by defendant, it was stated that, if the jury found defendant liable, then they would be required to consider what damages, if any, the next of kin had sustained by reason of the death of deceased, and it was further stated

"In determining the amount of damages, if any, you must be governed solely by the actual pecuniary money loss, if any is shown by the evidence, that the next of kin of deceased has sustained by reason of her death. You cannot allow any damages for sorrow, bereavement, mental suffering of the next of kin of the deceased, nor for any loss of society of said deceased."

Proof was made of the age of the deceased and as to her being the child of plaintiff and husband but no evidence of actual pecuniary loss to them was introduced. Plaintiff's counsel urge that, because of the words "if any is shown by the evidence," the giving of the instruction was prejudicial to plaintiff for the reasons that there was no occasion for plaintiff to show by evidence any actual money loss as there is a presumption of loss to parents in case of the death of a child of tender years, and that the jury, following the instruction, could but find against plaintiff because no actual pecuniary loss was shown. We think that the instruction was misleading and prejudicial under the circumstances. In Balchery v. Quinlan, 210 Ill. App. 321, 326, it is said: "Where proof of the age and relationship is made, the jury may estimate the damages from the facts proven in connection with their knowledge and experience,

and the law presumes some substantial damages to the parents from the fact of death alone," (citing, City of Chicago v. Scholten, 75 Ill. 468, 471; City of Chicago v. Heeing, 83 Ill. 204, 207; Dukeman v. Cleveland, etc. Ry. Co., 237 Ill. 104, 109.) The court gave another instruction, offered by plaintiff, relating to damages, but refused to give still another, offered by her, No. 28, which contained the element that, to enable the jury to estimate the amount of the damages, "it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances proved, and by considering them in connection with their knowledge, observation and experience in the affairs of ordinary life." Instructions, in substantially the same language, have been approved in North Chicago Street R. Co. v. Fitzgibbons, 180 Ill. 466, 469, and in Richardson v. Nelson, 221 Ill. 254, 258. The present case is not one where damages were sought to be recovered for medical expenses, or such other items as the law requires proof of. (See, Lyman v. Chicago City R. Co., 176 Ill. App. 27, 30.) And we think that, under the circumstances, the instruction should have been given.

Given instruction No. 24, offered by defendant, is as follows:

"It is not every injury or death that makes a defendant liable for damages to the person injured or killed. If the injury or death was unavoidable in so far as the defendant is concerned, then no liability is incurred by the defendant, whether as a result thereof a person is injured or killed, and if in this case you believe from the evidence that in so far as the defendant is concerned, the death of plaintiff's decedent was unavoidable, then the jury should find the defendant not guilty."

This instruction directs a verdict. From it the jury might well have concluded that, because the tub was toppled over by some of the playing children, defendant had nothing to do with the immediate happening of the occurrence and the death was "unavoidable in so far as defendant was concerned," and that it could not be held liable. No mention is made of the essential

element in the case of defendant's maintenance of an attractive nuisance, or of its possible prior negligence in failing to maintain fences around the premises where there were attractions to children, or in failing to warn or otherwise prevent them from coming on such premises, etc. It is well settled that, where an instruction is given directing a verdict if the jury shall find certain facts to exist, it must embrace all the facts and conditions essential to such verdict, and if it does not the defect is not cured by other instructions. (Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 531; Chicago Consolidated Traction Co. v. Schritter, 222 Ill. 364, 370; Mooney v. City of Chicago, 239 Ill. 414, 423.) In Carson, Pirie Scott & Co. v. Chicago Ry. Co., 309 Ill. 346, 352, in discussing a somewhat similar instruction, it is said that it "might in some cases be misleading." Under the facts of the present case we think that the instruction was misleading, erroneous and prejudicial.

Complaint is made of the giving of other instructions offered by defendant, and in the rejection of certain testimony offered by plaintiff, but we deem it unnecessary to discuss counsel's points because, if there were any errors in the matters mentioned, they are not likely to occur on another trial.

Because of the errors indicated the judgment of the Circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, F. J., and Fitch, J., concur.

BERNICE MURPHY, a minor, by
Cornelius Murphy, her father
and next friend,
Plaintiff in Error,
v.
WILLIAM J. RYAN,
Defendant in Error.

5756

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

241 I.A. 613

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks to reverse a judgment in her favor and against defendant for \$800, rendered after verdict by said Superior court, in an action for damages for personal injuries received by her in an automobile accident on the morning of July 2, 1923, in the intersection of Laramie avenue and West Monroe street, Chicago, Illinois. The main ground for reversal is that the trial court erred in overruling her motion for a new trial, because of the unreasonable inadequacy of the verdict, and in entering judgment on such verdict.

Plaintiff, about 14 years of age and a student in a high school, was a passenger in a Nash automobile, owned and driven by one Verne J. Tuttle, who had invited her to become such passenger. Immediately prior to the accident the automobile was being driven at a moderate rate of speed in an easterly direction on West Monroe street (an east and west street), approaching Laramie avenue (a north and south street). She was sitting on the front seat at the right of Tuttle. Just as they reached the intersection they noticed defendant's automobile, a Haynes touring car, moving south on Laramie avenue, approaching said intersection but then about 25 feet north of it. The Nash car reached the intersection first and, having the right of way under the statute (Section 33, Motor Vehicle Act, Cahill's Stat. 1923, p. 2339), and thinking that defendant would check the speed of his car, Tuttle, the driver of the Nash car, proceeded across the intersection. The Haynes car,

812 A.I. 143

THAT HE HAS NO OTHER INFORMATION TO REPORT.

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driven by defendant, continued on its southerly course at an excessive rate of speed, and struck the rear left wheel of the Nash car with such force as to swing it around and cause it to turn over near the south curb of West Monroe street on the east side of Laramie avenue. Witnesses of the accident rushed to the car, found both Tuttle and plaintiff lying beneath it and extricated them. Plaintiff was unconscious and her clothing was torn and stained with blood. She was taken to a hospital where it was found that her right collar bone was broken, her right shoulder and right knee badly injured and that she had suffered many serious and painful flesh wounds on her face and body. She remained in the hospital for over three weeks under the care of a physician, Dr. Huber, during which time an operation was performed on the collar bone and shoulder. She then was taken to another hospital where she remained for two weeks under the care of other physicians. After receiving further treatment there and subsequently at her home, it was found that there was an overlapping of the bones, that an infection had developed and that there was a discharging sinus. Plaintiff was taken again to said other hospital, where a second operation was performed on her shoulder. Shortly before the trial she was examined by Dr. Huber who testified as to her then condition: "I find the shoulder is thrown forward a little bit and leaves the blade at the bottom end projected backward a little, giving a little hump to that right shoulder. This condition is permanent. The two fractured ends of the bone are abnormal; they are overlapping; they are healed in this position now. * * The present condition of the knee is as good as can be expected under the very severe injury that she had. However, at times she will have considerable pain and annoyance from the knee." Plaintiff testified: "My right shoulder at the back of the shoulder blade protrudes and there is a bone that sticks out. * * The right shoulder blade did not stick out any further than the left before the accident.

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* * The shoulder pains me occasionally and always in bad weather. I have not much strength in my right arm now. * * Since the accident my right leg bothers me when I stand on it for any considerable length of time. It pains me and is weak, though I have now a fairly normal motion of the right leg." There was also evidence that the reasonable charges for the services of the attending physician, exclusive of nurses' charges and hospital expenses, were \$350.

After a careful review of the evidence we are of the opinion that the accident and injuries to plaintiff were proximately caused by the negligence and careless driving of the defendant; that the injuries she received were severe and painful, some of them being permanent; that the damages awarded her by the jury are unreasonably inadequate; and that the trial court erred in not granting her motion for a new trial on account of the inadequacy of the verdict, and in entering the judgment in question. It is well settled by the weight of authority that an unreasonably small verdict, as well as a grossly excessive one, is subject to review by the courts, and that one of the first named character in an action for personal injuries should be set aside and a new trial awarded in the interests of justice. (Guy v. Wahlfeld Mfg. Co., 179 Ill. App. 235, 238; Tatwell v. City of Cedar Rapids, 122 Iowa 50, 54; Toledo Ry. & Light Co. v. Mason, 51 Ohio St. 463, 465; Torr v. United Railroads, 187 Calif. 505, 509; Handerson v. St. Paul & Duluth R. Co., 52 Minn. 479, 483.)

Plaintiff's counsel also contend that the trial court committed prejudicial errors in certain rulings on evidence (a) in unduly restricting the re-direct examination of plaintiff's witness, Leah Mabie, and (b) in excluding testimony of several of plaintiff's witnesses as to a certain statement made by defendant, immediately after the accident, as to why he did not stop or check the speed of his automobile. The witness, Leah Mabie, on direct examination had given testimony, as had other witnesses for plaintiff, tending to show that the Nash automobile, in which

plaintiff was riding, reached the intersection first; and on cross-examination she made a statement which tended to show that the contrary was the fact. On re-direct she was asked questions which gave her an opportunity to explain, correct or modify her previous statement made upon cross-examination, if she so desired. She was not allowed to answer the questions. Under the circumstances, as disclosed in the present record, we think the rulings were erroneous. (Mahony v. Gough, 141 N. W. Rep. (Mass.) 605, 606; Eschbian v. Detroit United Railway, 316 Mich. 391, 395; Goldberg v. United States, 295 Fed. Rep. 447; 450; Diets v. Big Muddy Coal Co., 263 Ill. 480, 488; Russell v. State, 87 So. Rep. (Ala. App.) 221, 223.) As to the excluded testimony as to the statement made by defendant immediately after the accident, plaintiff's attorney offered to show that defendant then stated in the hearing of said witnesses that he thought he had the right of way because he was traveling on a street (Lawrence avenue) which had a street car line upon it and that otherwise he would have stepped his automobile and let the trolley car pass in front of him. We regard this excluded testimony as tending to show an admission of defendant, concerning a matter in dispute, which should have been allowed in evidence. (Clark v. Smith, 87 Ill. App. 409; Smith v. Gray, 316 Ill. 488, 500.)

Complaint is made of other alleged errors of the court during the trial. We will not discuss them. If errors there were, they are not likely to occur on another trial.

For the reasons indicated the judgment of the Superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

plaintiff's attorney, together with the introduction of the

overstatement she made a statement which tended to show

the contrary of the fact. On cross-examination she was asked questions

which gave her an opportunity to explain, and she so explained.

Previous statements made upon cross-examination, if she so desired,

she was not allowed to answer the questions. Under the circum-

stances, as discussed in the present record, we think the ruling

was erroneous. Marbury v. Graham, 141 U. S. 1364, 1365, 1366;

Marbury v. Graham, 141 U. S. 1364, 1365, 1366; Marbury v.

Marbury, 141 U. S. 1364, 1365, 1366; Marbury v.

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Marbury, 141 U. S. 1364, 1365, 1366; Marbury v.

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Marbury, 141 U. S. 1364, 1365, 1366; Marbury v.

Marbury, 141 U. S. 1364, 1365, 1366; Marbury v.

30382

124 - 30382

PEOPLE ex rel. PHILIP PAVLIC,
Appellee,

v.

WILLIAM E. Dwyer, Mayor of the
City of Chicago, AL F. GORMAN,
City Clerk, THOMAS P. KEANE,
City Collector, and MORGAN A. COLLINS,
Superintendent of Police,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

241 I.A. 614

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 4, 1925, the Superior court overruled respondents' general demurrer to relator's petition for a mandamus, and, respondents' electing to stand by their demurrer, the court ordered the writ, commanding them "to forthwith issue a retail beverage dealer's license, Class A, to said Philip Pavlic." This appeal followed. The relator has not filed any brief in this appellate court.

The petition alleges that relator is and has been a resident of the city and is the owner of premises known as No. 5200 South Albany avenue, Chicago; that he is a person of good moral character and enjoys such reputation in the community in which he lives; and that he has never been convicted of felony or misdemeanor, and has never been summoned to court in a criminal proceeding. Certain ordinances of the City, viz, numbered sections of the Municipal Code, are then set forth as being in effect. In section 3464 a "retail beverage dealer" is defined; in 3465 provision is made for a license for such a dealer, and in 3466 a classification of such dealers is made, Class A and Class B, and the amount of the license fee for each class stated. Section 3467 states in part:

• *Author's address: Dept. of Systems
Engineering*

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13-4-118

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Two activities always have to be done in one hour:

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1993-1994

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1970-1971

1. The first part of the document is a list of names and their corresponding addresses. The names are listed in a single column, and the addresses are listed in a single column to the right of the names. The names are: John Doe, Jane Doe, and John Doe. The addresses are: 123 Main St, 456 Main St, and 789 Main St.

From the fact that the same result is obtained if a set of n points is chosen at random from the set of all points in the plane, it follows that the probability of finding a set of n points in the plane which are all within a distance r of each other is $(\frac{r}{R})^2$.

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10-11-1961

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"Any person, * * desiring to engage in the business of a retail beverage dealer, as defined in this article, shall make an application in writing for a license so to do which shall conform to the general requirements relating to applications for licenses. Such application shall also state the length of time that said applicant, if an individual, has resided in the City, his place of previous employment, whether married or single, whether he has ever been convicted of felony or misdemeanor, and whether he has been summoned to court in a criminal proceeding, which statement shall be signed and sworn to by the applicant and filed with the city collector as a permanent record. The City Collector shall forward the application to the Superintendent of Police for investigation, * * who, if such investigation proves satisfactory, shall indorse his recommendation thereon and forward same to the City Collector. * * "

It is further alleged that petition^{er} applied to the City Clerk and City Collector for the issuance of a license, and tendered the customary fee, and said two officials, together with said Mayor and Superintendent of Police of said City, refused the application, "a copy of which is ready to be produced in Court," and refused to issue a license; that petitioner "has complied with all laws and ordinances relating to health, safety, sanitation, location or otherwise, regulating the said business;" that the action of said Superintendent of Police, in recommending the refusal of said license, "is unjust and illegal;" and that the action of said Mayor, in refusing said license, "is arbitrary, wrongful and without legal cause."

We think the court erred in overruling respondents' demurrer to the petition and in entering the order appealed from. It is well settled that a writ of mandamus should only be awarded in cases where the party applying for it shows a clear right to it, and a clear legal duty on the part of the respondent to perform the act sought to be enforced. (People v. Buasa, 248 Ill. 11, 16; People v. City of Chicago, 280 Ill. 576, 580.) It is equally well settled that the petition for the writ must state facts and not the mere conclusions of the pleader. (City of Chicago v. People, 210 Ill. 84, 89; People v. Buasa, 248 Ill. 11, 17.) It will be noticed that some of the material allegations of the present

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petition contain statements of mere conclusions, rather than facts from which these conclusions may be drawn. Furthermore, the application for the licence desired is not set forth in the petition, so that it does not appear on the face of the petition whether the application complied with all the requirements mentioned in the ordinance. Petitioner should have either set out the application in haec verba or should have shown, by distinct and specific averments, that it ^{had} complied with all of the requirements. (People v. Village of Crotty, 93 Ill. 180, 189.)

The judgment of the Superior Court is reversed.

REVERSED.

Barnes, F. J., and Fitch, J., concur.

[illegible]

125 - 30383

PEOPLE ex rel. JOHN FULLA,
Appellee,

v.

WILLIAM E. DAVEN, Mayor of the
City of Chicago, AL. F. GORMAN,
City Clerk, THOMAS P. KEANE,
City Collector, and MORGAN A.
COLLINS, Superintendent of Police,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

241 PA. 814

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding wherein the relator sought to compel respondents to issue to him a retail beverage dealer's license for the premises located at 4328 Ashland Avenue, Chicago. To the petition respondents filed a general demurrer which was overruled by the court. They elected to stand by their demurrer, whereupon the court ordered the writ to issue substantially as prayed. Respondents appealed.

The petition contains substantially the same averments as those in the petition at the relation of Philip Pavlic, concerning which the same procedure was followed and a similar order granting the writ was entered. In the opinion in the Pavlic case, No. 30382, this day filed, we held in substance that the petition did not state such a case as warranted the issuance of the writ, and that holding is applicable to the present case.

For the reasons stated in said opinion in the Pavlic case the judgment of the Superior court in the present case must be reversed and it is so ordered.

REVERSED.

Barnes, P. J., and Fitch, J., concur.

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the position contains substantially the same information as that in the position of Philip Boyce, and it is noted that the same person was employed and a similar order was issued. In the opinion of the writer, the position was not changed, this day being, as said in substance that the position was not changed and a case was returned the amount of the wage.

For the reasons stated in said opinion in the Revised
and the judgment of the majority in the Revised
and the judgment of the majority in the Revised

—continued—

STIGER & SONS PIANO MANUFACTURING
COMPANY, a corporation,
Appellant,

v.

BOULEVARD STATE SAVINGS BANK,
a corporation,
Appellee.

Appeal from
Superior Court,
Cook County.

241 I.A. 614

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 6, 1923, plaintiff, an Illinois corporation, commenced an action in trover against the defendant bank for damages for the unlawful conversion of certain notes or contracts, of the value of \$20,000, and of which plaintiff claimed to be the owner. Attached to the declaration was an itemized list of the notes or contracts. The bank filed a plea of not guilty. A trial was had before a jury in May, 1925, during which plaintiff introduced considerable evidence, oral and documentary. At the conclusion of its evidence the court, over objection, instructed the jury to return a verdict for the defendant bank. Following such verdict judgment was entered against plaintiff for costs and this appeal followed. The main contention of its counsel is that the trial court erred in so instructing the jury, and that the judgment should be reversed and the cause remanded for a new trial.

Plaintiff, hereinafter referred to as the Company, manufactured and sold pianos, phonographs and accessories. Sales were made in part through agents under consignment contracts. On February 16, 1921, the company entered into such a contract, limited to pianos, with one Fred J. Joers, then doing business under the name of the Royal Music Shop at 4001 Elston avenue, Chicago. It is in the form of a letter or proposition signed by him and addressed to the Company, and it bears thereon the Company's written acceptance. It states that, in consideration of the Company's promise

and undertakings and his right to sell its pianos. Joers will take pianos "on consignment for sale in 4001 Elston Avenue, Chicago, and vicinity, upon the following conditions:" Then follow the terms and conditions in 13 separate paragraphs, some of which are in substance: (1) That Joers is to hold such pianos as are furnished him by the Company as "agent and bailee on consignment until sold" - such sale being approved and accepted by it - "or until returned" to it; and that Joers will keep all pianos insured for its benefit, at no expense to it, - the policies being payable to it in case of loss. (2) That on all cash sales, Joers is to immediately remit to the company in cash the "consignment value" of the instrument, less such discount as may be agreed upon; that on all part cash sales Joers may retain the first cash payment, but not exceeding the compensation allowed him for making the sale, and he agrees to "endorse and transfer" to the company "all notes, contracts or leases" and he guarantees the payment of the same; that, if default is made in the payment of said notes, etc., so guaranteed, or if the company does not approve of or accept the sale, Joers agrees, upon the company's demand, to obtain the repossession of the instrument, without expense to it, or to allow the company to obtain such repossession at his expense; that, in case of failure to regain possession, Joers agrees to immediately pay to the company the consignment value of the instrument in cash, and further agrees that any indebtedness of his to the company shall be a first lien on all collateral deposited with it, as security for such indebtedness; and that Joers "hereby assigns" to the company all his right, title and interest in and to any and all of the collateral so endorsed and deposited with it, "or placed to my collateral credit," so as to secure the company "until every transaction made by virtue of this contract has been fully completed and satisfied;" and that Joers "is in no case to use or appropriate any of said collateral or

and undertakings and his right to sell his shares, there will
take place an assignment for sale in 1901. It is assumed
Chicago, and vicinity, upon the following conditions: That
follow the terms and conditions in its corporate documents, some
of which are in substance: (1) That there is to hold each share
an agreement entered into by the Company as "agent and holder on con-
sideration of the said" - such sale being approved and accepted by
it - for small portions" to it and that there will keep all
plans entered for the benefit, at an expense to it - the policies
being payable to it in case of loss. (2) That on all such sales,
there is to immediately remit to the company in cash the "amount-
due" of the said shares, less such amount as may be owing
there; that on all such sales there may retain the first cash
payment, but not exceeding the compensation allowed him for making
the sale, and he agrees to transfer and transfer to the company
all such, together with interest, and he guarantees the payment of
the same; that, if there is more in the payment of such notes,
the same, as mentioned, or if the company does not receive it or
except the sale, there shall, upon the company's failure, be paid
the proceeds of the said shares, without expense to it, to be
given the company to obtain such redemption of the shares; that,
in case of failure to regain possession, there agrees to immediately
pay to the company the redemption value of the shares; in
case, and further agrees that any indebtedness of his to the
company shall be a first lien on all real and personal property
it, as security for such indebtedness; and that there hereby
assigns to the company all his right, title and interest in
and to any and all of the real and personal property and interest
which is, or shall be, by collateral title, or in any
the company shall every transaction made by virtue of this con-
tract has been fully completed and satisfied; and that there

other proceeds of such sales," without the company's consent.

(4) That "all proceeds of such sales," including all notes, contracts, leases, mortgages or other securities, "shall belong to and title thereto shall vest" in the company "as sole owner of such proceeds on consummation of such sales;" and Joers agrees "to keep the proceeds of all sales or leases of all instruments and property consigned hereunder separate and apart from other moneys, leases or papers" as the company's "exclusive property, so that the same can be at all times properly identified;" and "all notes, contracts, leases and other securities received from or taken in the sale of said goods shall be made payable to you (the company) and be subject to your approval and acceptance."

(5) In this paragraph is specified the manner of determining the amount of the compensation which Joers is to be allowed. (8) Herein Joers agrees to deliver to the company, on its demand, all notes, contracts and leases, which it has not specifically released to him under this contract, and which may be in his possession or control. (11) Herein it is agreed that the securities taken by Joers shall be in such form as to make them first liens, and "to be on blanks furnished" by the company; and that, in case any of such securities are taken in Joers' name, "the same shall be immediately endorsed or assigned to you (the Company) in writing without reserve;" and that the taking of such securities in Joers name "shall not be deemed a modification of this contract or a waiver of any right, title or interest retained by or secured to you (the Company) hereunder." Attached to the contract and made a part thereof is a certain schedule as to terms and commissions.

Beginning February 16, 1921, Joers operated under the contract in receiving on consignment and selling pianos manufactured by the Company. On December 2, 1921, a similar contract was entered into and acted upon as to phonographs, and on January 10, 1922, a second contract as to pianos was executed, - substantially identical

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with the first except as changed in the schedule as to terms and commissions, more liberal to Joers. Under these contracts the Company from time to time shipped to Joers a large number of pianos and phonographs, direct from its factory at Steger, Illinois, the draymen, upon delivery of the same to Joers at his place of business, taking his receipts therefor. He afterwards sold the instruments, thus consigned and delivered, to various purchasers, and, where any payments therefor were deferred, took from them notes or contracts (similar to the ones sued upon), - all on blank forms furnished by the Company. Each of the notes or contracts was dated and first contained the promise of the subscriber "to pay to the order of F. J. Joers" a specified sum of money at his Chicago office - a certain amount down and a certain amount per month with 6% interest until paid. Then followed statements that the consideration for the payment of said amounts is the agreement of F. J. Joers to sell and deliver to the subscriber an instrument (describing it, - a piano or phonograph, as the case might be); that the same should "remain the property of said F. J. Joers" until all of said payments should be made in full; that in case the subscriber makes default in any payment, or shall sell, assign or remove or in any way dispose of the instrument without the written consent of Joers or his assigns, or if Joers, or his assigns, shall feel unsafe or insecure, said subscriber shall deliver back the instrument on demand to Joers or his assigns, or he or they shall have the right to take immediate possession thereof; that, in case he or they shall retake possession all moneys paid on the purchase price thereof shall belong to him or them as liquidated damages, etc., or, either he or they may at their option enforce the payment and collection of each and all of said amounts and interest; that in case the subscriber pays each and all of said amounts the full and complete title of the instrument shall pass to and vest in the subscriber; and that the subscriber agrees to in-

[illegible]

sure the instrument in favor of Joers as his interest may appear. The taking of these notes or contracts in Joers' name was in accordance with the provision contained in the 11th paragraph, above mentioned, of the consignment contract between the Company and Joers.

The evidence further discloses that, as to some of the notes or contracts taken by Joers from his customers, he did not comply with the other provision of said 11th paragraph of said consignment contract (viz, that, where such customers' notes or contracts were taken in Joers' name, he would immediately endorse and assign the same without reserve to the Company); that he, as early as April, 1921, having a checking account with defendant bank which was located a short distance from his music shop, endorsed and delivered some of these customers' notes and contracts to the bank as collateral security for a personal loan to him, as evidenced by his 30-day note payable to the bank; that these notes and contracts were endorsed "Royal Music Shop by F. J. Joers" and "F. J. Joers;" that said 30-day personal note was renewed from time to time and other similar notes given, secured by similar collateral, and from time to time the collateral was changed and deposited in lieu of that withdrawn; that Joers ceased doing business early in November, 1922, and disappeared; that at the time of his disappearance he owed the bank \$5,000 on his 30-day personal note, dated October 31, 1922, which was collaterally secured by certain of said notes and contracts (or copies thereof), so endorsed and delivered to the bank and having a face value of approximately \$19,000; that about the time of Joers' disappearance Mr. Werdzinski (plaintiff's witness and cashier of the defendant bank) checked over and made an investigation as to the collateral deposited with the bank; that it was ascertained that Joers had made copies of some of the notes or contracts taken from his customers, had forged the subscribers' names on the copies, had endorsed and delivered some

44

that the statement in favor of Jones as his interest was known.
The taking of these notes or records in 1932, were in
accordance with the provision contained in the 11th paragraph.
above mentioned, of the amendments entered between the Company
and Jones.

The evidence further discloses that, as to some of the
notes or statements taken by Jones from his witnesses, he did not
comply with the other provision of said 11th paragraph whereby
statements should be taken (viz, that, where such statements, notes or
statements were taken in 1932, same, he would immediately deliver
the same to the Board of Directors of the Company) that he, on
July 10, 1932, did not deliver same to the Board of Directors
but that he was located a short distance from the same place, and
there and delivered same to three witnesses, notes and statements
as the same as collected monthly for a personal loan to him, as
evidenced by his monthly note payable to the bank; that these notes
and statements were endorsed "Royal Bank" and by J. J. Jones, and
on 11, 1932, that said 30-day personal note was received from him
to him and other statements given, received by similar delivery,
and from time to time the statements were changed and deposited in
bank at that institution; that these changed statements were in
accordance with, and disappeared; that at the time of his disappearance,
1932, he said that he had no 30-day personal note, and that
on 11, 1932, which was immediately received by certain of said
witnesses and sent to the (or signed therefor), as evidenced and delivered
to the bank and having a face value of approximately \$10,000; that
about the time of Jones' disappearance the statements (statements)
deposited and taken of the (Royal Bank) changed over and made
an investigation as to the statements deposited with the bank
that it was ascertained that Jones had been taken to him at the
office of the institution from the statements, and that the

of these forged copies to the bank, giving the genuine notes or contracts to the Company, or had endorsed and delivered some of the genuine notes or contracts to the bank, giving the forged copies to the Company; that it was further ascertained that of the 73 notes or contracts which the bank had in its possession, 28 were originals and genuine, and 30 probably forged copies, and, as to the remaining 15, it was uncertain whether the bank held the originals or the forged copies; that about this time the Company also made an investigation as to the state of its accounts with Jeers, and for the first time learned of the endorsement and delivery of some of the notes or contracts of Jeers' customers to the bank; that during November and December, 1922, two representatives of the Company called at the bank, had two interviews with Wardzinski, and demanded that the bank surrender to the Company all of said notes or contracts in its possession; and that the bank refused the demand, but allowed said representatives to check over the notes or contracts in its possession. Milton E. Bellett, one of the Company's representatives who called at the bank, testified that during the first interview with Wardzinski in November, 1922, Wardzinski (who had conducted most of the business transactions which Jeers had had with the bank) was asked if he did not know, when Jeers had endorsed and delivered to the bank the notes or contracts in question as collateral security for Jeers' personal notes to the bank, that the same were collateral contracts, covering pianos owned by the Company and which had been consigned to Jeers under consignment contracts between him and the Company, and that the bank "had no business accepting the contracts as collateral security;" and that Wardzinski replied: "Well, what about it; suppose I did know anything about consignment contracts; that has nothing to do with the case; this man forwarded these contracts here to us, and whether I knew they were consignments or not doesn't make any difference; we accepted the contracts because Steger & Sons' name was not on the contract;

we accepted them as collateral security because we had been doing business with this man."

Counsel for the bank here contend that the contract between the Company and Joers of February 16, 1921, and the subsequent similar ones, were "contracts of sale," as distinguished from consignment contracts. After a careful reading of them we are unable to agree. In the very first lines it is stated that Joers will take the pianos or phonographs "on consignment for sale" upon the terms and conditions thereafter mentioned; and in the 1st of the 13 paragraphs, outlining these terms and conditions, it is stated that Joers is to hold such pianos or phonographs as are furnished him by the Company "as agent and bailee on consignment until sold;" and we think that the entire contract discloses that it was not the intention of the parties that there was to be a sale of the pianos, etc. to Joers: (See Long v. Harrison, 143 Ill. 598; Brown v. John Church Co., 55 Ill. App. 618; Fleet v. Hertz, 201 Ill. 594.) And, in our opinion, the delivery of them to Joers under the contracts did not clothe him with the indicia of ownership thereof. "Clothing another person with the indicia of ownership does not mean simply giving possession of a chattel. Possession of a chattel is one of the indications of title, but possession may be delivered by the owner to a bailee, an agent or a servant, and the mere possession of a chattel, if there is no other evidence of property given by the owner, will not enable the possessor to give a good title." (Drain v. La Grange State Bank, 303 Ill. 330, 336; Sherer-Gillatt Co. v. Long, 318 Ill. 432, 435.) In the Drain case (p. 335) it is said:

"It is a general, well established principle that no one can transfer a better title than he has. No person can by his sale transfer to another the right of ownership in a thing in which he has not the right of property, except in the case of cash, bank bills, checks and notes payable to bearer or transferrable by delivery in the ordinary course of business to a person taking the same bona fide and paying value for it. * * The purchaser of property wrongfully taken by his vendor from the true owner can obtain no more perfect title to the property purchased than the vendor himself

possessed, and an innocent purchaser without notice of a wrongful taking can acquire no better title to property than his vendor had. * * While that is true, an estoppel may operate against the person claiming what would otherwise be the better title, and this is based upon conduct of the true owner by which he allows another to appear as the owner of or having full power of disposition over property, so that an innocent third person is led into dealing with an apparent owner. The estoppel does not depend upon where the actual title is, but rests upon the act of the real owner, which precludes him from disputing the existence of a title which he has caused or allowed to appear to be vested in another."

In the Sherrar-Gilllett case, supra, (p. 434) it is said:

"In order to give rise to an estoppel, however, it is essential that the party estopped shall have made by act or word a representation, and that the person setting up the estoppel shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction."

The evidence introduced by the Company in the present case shows that, while Joers did not improperly sell or attempt to sell any of the consigned pianos, etc., to the bank, and while he, in accordance with the consignment contracts, did properly sell the consigned goods to the customers, receiving notes or contracts from them in part payment of the goods as he was authorized to do, yet he, improperly and in violation of the terms of the consignment contracts, endorsed and delivered some of said customers' notes or contracts to the bank, as collateral security for his own personal note for money borrowed from the bank, instead of immediately endorsing and assigning said customers' notes to the Company, as he had agreed to do. He committed a fraud upon the Company. He was not the true owner of said customers' notes or contracts, and, not having lawful title thereto, he could not give good title to the bank. As to the question, whether under the evidence the Company by its acts and conduct was estopped to show that it was the true owner of said notes or contracts, we think it was one for the jury to determine, under proper instructions.

10400 of 11 (100%)

Figure 10-16

1. The first step is to identify the problem or question that needs to be answered.

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...and the

⁶ The *Journal* attempted to protect the author with the following note on the title page:

... ..

12-00000 is, according to some like La name; and all

• *Journal of the American Medical Association*, 1997; 277: 1033-1037

Counsel for the bank here strenuously urge that the notes or contracts in question were negotiable and counsel for the Company, on the other hand, earnestly contend that they were not. Considering, but not deciding, them to be negotiable, any presumption in favor of the bank's good title thereto is overcome by the evidence introduced, which shows that they were fraudulently negotiated by Jeers, and the burden was upon the bank to show that they took the same in good faith for value before maturity and in the usual course of business. (Hild and Leather Bank v. Alexander, 184 Ill. 416, 419; Merchants Loan and Trust Co. v. Welter, 305 Ill. 647, 649; Justice v. Stoncipher, 367 Ill. 448, 453; Holl v. McDonald, 308 Ill. 329, 334.) The evidence introduced by plaintiff, with all its legitimate inferences, tended to show that the bank did not take the notes or contracts from Jeers in good faith, but had knowledge of the Company's rightful ownership thereof.

Our conclusion is that the trial court erred in directing the jury, on motion of the bank at the conclusion of plaintiff's evidence, to return a verdict in favor of the bank on the issue made by the pleadings as to whether the bank was guilty of an unlawful conversion of the notes or contracts in question. (Giffatt v. World's Columbian Exposition, 175 Ill. 472; Libby, McNeill & Libby v. Cook, 222 Ill. 206.) Accordingly, the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Fitch, J., concur.

PEOPLE ex rel. JOHN ROMANSKI,
Appellee.

v.

WILLIAM E. DEYNE, Mayor of the
City of Chicago, AL F. GORMAN,
City Clerk, THOMAS F. KEANE, City
Collector, and NORMAN A. COLLINS,
Superintendent of Police,
Appellants.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

241 I.A. 614

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding wherein the relator sought to compel respondents to issue to him a retail beverage dealer's license for the premises located at 1435 West 47th street, Chicago. To the petition respondents filed a general demurrer which was overruled by the court. They elected to stand by their demurrer, whereupon the court ordered the writ to issue substantially as prayed. Respondents appealed.

The petition contains substantially the same averments as those in the petition at the relation of Philip Davlie, concerning which the same procedure was followed and a similar order granting the writ was entered. In the opinion in the Davlie case, No. 30302, this day filed, we held in substance that the petition did not state such a case as warranted the issuance of the writ, and that holding is applicable to the present case.

For the reasons stated in said opinion in the Davlie case the judgment of the Superior court in the present case must be reversed and it is so ordered.

REVERSED.

Barnes, P. J., and Fitch, J., concur.

341 I.A. 61

WEEK COUNTY
REVENUE DEPT.
MAY 1904

RECEIVED
MAY 1904
WEEK COUNTY
REVENUE DEPT.
MAY 1904

THE STATE OF TEXAS,
COUNTY OF WEEK,
I, the undersigned, Clerk of the County, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears on the records of the County Clerk's Office.

WITNESSED my hand and the seal of said County at the City of Dallas, Texas, this 1st day of May, 1904.

CLERK OF COUNTY.

Witness my hand and the seal of said County at the City of Dallas, Texas, this 1st day of May, 1904.

5 11 10

HARRY L. HARRIS and
JOHN A. RODGERS, trading
as Harris & Rodgers,
Plaintiffs and Appellees,

v.

JOSEPH THEODORE RAMPICH, Jr.,
MICHAEL JOSEPH MILLAS and
JOSEF RAMPICH, Sr.,
Defendants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MICHAEL JOSEPH MILLAS and
JOSEF RAMPICH, Sr.,
Appellants.

241 I.A. 617

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On November 26, 1924, plaintiffs caused a judgment by confession for \$602 to be entered against defendants on a judgment note for \$528, dated October 17, 1924, and payable to the order of plaintiffs in weekly installments of \$11 each. The note provided that the entire principal sum should become due and payable three days after default in making payment of any of the weekly installments, and further provided for attorney's fees in case judgment was confessed on the note. Only one installment of \$11 had been paid and the amount of the judgment was made up of \$517 due on the note and \$85 attorney's fees.

Subsequently two of the defendants, Millas and Josef Rampich, Sr., filed separate petitions, signed and verified, alleging in substance that their purported signatures on the note were not their genuine signatures and that they had never authorized any other person to sign their names thereon, and praying that the judgment be opened, etc. On February 6, 1925, the court ordered that the judgment be opened; that defendants' petitions stand as their several affidavits of merits on the issue presented; and that there be a trial on the merits, the

judgment in the meantime to stand as security, etc. Subsequently there was a hearing without a jury, resulting in the court, on April 4, 1925, finding the issues against said defendants and adjudging that the judgment, as confessed on November 26, 1924, stand in full force and effect.

The bill of exceptions discloses that the trial commenced on March 31, 1925. Josef Rampich, Sr. was called as a witness in his own behalf. He testified that it was not his signature on the note and that he had not authorized anyone to sign his name thereon. Defendant Millas gave testimony to the same effect. Thereupon, each of said defendants, at the court's request, wrote without protest their respective signatures on a piece of paper and handed it to the judge, who compared the signatures with the purported signatures on the original note. The court overruled the objection of defendants' attorney to the making of such comparison and suggested that plaintiffs' attorney procure a handwriting expert and have him testify as a witness on April 4, 1925. At the adjourned hearing plaintiffs' attorney offered in evidence the original note, the paper upon which said two defendants had written their signatures, and their respective petitions above mentioned upon which were their genuine signatures. It was agreed that photostatic copies of these papers be taken and inserted in the bill of exceptions in lieu of the originals. (Such photostatic copies are in the present transcript.) Thereupon plaintiffs called as a witness James Ennis, a handwriting expert in Chicago for many years. After being properly qualified as such, he compared defendants' purported signatures on the note with their genuine signatures on said paper and petitions, and testified that in his opinion the signatures on said note were the genuine signatures of said two defendants. He gave his reasons for such opinion and was cross-examined at length by defendants' attorney. Defendants thereupon called as a witness the other defendant, Joseph Theodore

[illegible]

Rampich, Jr. He testified in substance that he gave the note to plaintiffs in part payment of an automobile which he had purchased; that he wrote his name thereon and also wrote thereon the names of the other defendants, his brother-in-law and father respectively; and that "they did not know a thing about it," and never authorized him to so write their names.

Appellants' counsel urge various points as grounds for a reversal of the judgment, which in effect amount to two, viz., (1) that the court's finding is against the weight of the evidence, and (2) that the court erred in causing appellants to write their signatures on a piece of paper and comparing said signatures with those on the note, and in suggesting that plaintiffs procure a handwriting expert to compare the same and give his opinion, etc. After reviewing all the evidence, and after comparing the said photostatic copies of the disputed signatures with the admitted signatures of the defendants, we are unable to say that the finding is against the weight of the evidence. And we do not think that any prejudicial error was committed by the court in the procedure adopted. It was proper for the court to itself compare the disputed signatures with those on the other papers, introduced in evidence and admittedly genuine. In the Act "concerning proof of handwriting and to permit proof of handwriting to be made by comparison," in force July 1, 1915, (Cahill's Stat. 1923, Chap. 51, Sec. 50, p. 1704), it is provided in section 1: "That in all courts of this State it shall be lawful to prove handwriting by comparison made by the witness or jury with writings properly in the files or records of the case, admitted in evidence or treated as genuine or admitted to be genuine, by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the court." In Greenebaum v. Bornhofen, 167 Ill. 640, 645, it is decided that, where the issue in a

1917-1918, the plaintiff in evidence that he gave the name

to plaintiff in each payment of an automobile which he had
purchased; that he wrote the name therein and also wrote thereon
the names of the other defendants, the defendant-in-law and taking
therefrom; and that "they did not know a thing about it."

and never mentioned him or his wife's names.
"Annoyed," counsel says various points as follows for
a summary of the testimony, which in effect amounts to two, viz.,
(1) that the court's finding is against the weight of the evi-

dence, and (2) that the court erred in causing explanation to
be given to the jury in a place of error and suggesting that
the jury was in error on the facts, and in suggesting that the
jury was in error in suggesting that the jury was in error and give

its opinion, etc. After reviewing all the evidence, and after
examining the sole material copies of the alleged statements
and the admitted statements of the defendant, we are unable to
say that the finding is against the weight of the evidence. and

we do not think that any prejudicial error was committed by the
court in the procedure adopted. It was proper for the court to
have caused the alleged statements with those on the other
pages, introduced in evidence and admitted evidence. In the

and "conclusive proof of handwriting and its genuineness of hand-
writing to be made by comparison," in Texas July 1, 1915, (Cobbitt's
case, 1905, 50 Tex. 50, 1904), it is provided in section
11: "That in all courts of this State it shall be lawful to prove

handwriting by comparison made by the witness or jury with writing
genuinely in the files of records of the case, admitted in evi-
dence or introduced as genuine or admitted to be genuine, by the
court, and when the evidence is offered, or proved to be genuine

in the collection of the court." In Ex parte, where the issue in a
1917-1918, etc. it is decided that, where the issue in a

trial without a jury is whether or not certain signatures are genuine, the court may, and should, compare them with signatures in evidence admitted to be genuine, as a means of determining whether they are genuine. (See, also, Cook v. Moecker, 217 Ill. App. 479, 484, 487; Southwestern Milling Co. v. Fernstrom, 226 Ill. App. 468, 472.) And, under the circumstances, we think it was proper for the court to suggest that the testimony of a handwriting expert be secured in order to assist the court in determining the issue presented. In the cases of Crane v. Mercantile Trust & Savings Bank, 218 Ill. App. 497, 500, and Marble v. Marble's Estate, 223 Ill. App. 524, 530, the opinions of handwriting experts were admitted in evidence, after comparison made of the disputed signature with admittedly genuine signatures, and such opinions considered in connection with other evidence.

The judgment of the Municipal court, confirming the judgment entered by confession on November 26, 1924, should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

[illegible]

HATTIE MINNIFIELD GILBERT,
Appellant,

v.

NATIONAL LIFE AND ACCIDENT
INSURANCE CO., a corporation,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 615

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, the beneficiary named in three life insurance policies, issued by defendant company and insuring the life of Anna Grant, who died on January 6, 1925, brought suit against the company in the Municipal court on March 3, 1925, to recover \$509, the total amount claimed to be due on all three policies. Two of them, having been in force for more than two years, were uncontestable, and the amount due on both was \$94. The third policy was for \$415 and was dated and issued on November 12, 1923, and the company contested it on the ground that the insured was not in sound health on that date. On the trial, without a jury in May, 1925, the company tendered into court the \$94 due on the two policies and \$15.75 for refund of all premiums paid on the third policy - a total of \$109.75, and the court assessed plaintiff's damages at said total sum, not allowing any recovery on the third policy. A judgment against the company for \$109.75 followed and plaintiff appealed.

The contested policy contained the provision: "No obligation is assumed by the Company prior to the date hereof, nor unless on said date the insured is alive and in sound health. Should the proposed insured not be alive or not be in sound health on the date hereof, any amount paid to the company as premiums hereon shall be returned." It was stipulated on the trial that all premiums due on the contested policy, amounting to \$15.75.

had been duly paid prior to the death of the insured, that due proofs of death had been made, and that at the time the policy was applied for and issued the insured believed herself to be in sound health. No medical examination was required to be made, or was made, of the insured prior to the issuance of the policy.

After a review of the transcript we are of the opinion that the finding and judgment of the court are fully sustained by the evidence and the law. It is admitted that the insured died of "tubercular peritonitis." In the official death certificate, introduced in evidence without objection, the cause of her death is given as "tuberculosis peritonitis" and the contributory or secondary cause as "debility from urinary faecal fistula." The testimony of defendant's witness, Dr. Adler, a surgeon on the staff of the Cook County hospital, who on January 29, 1924, there made an examination of the insured and took her medical history, and a few days later assisted in an operation performed upon her, clearly showed that she was not in sound health on November 12, 1923, and that she was then and had been for more than a year prior thereto suffering from tuberculosis in the abdominal region, and from other diseases. It is well settled that, where a policy of life insurance contains a provision, such as the provision in the present policy, there can be no recovery thereon, unless at the date of issuance the insured was in fact in sound health. (Sulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76, 79; Murphy v. Same, 106 Minn. 112, 113; Gallant v. Same, 167 Mass. 79, 81; Daniels Motor Sales Co. v. New York Life Ins. Co., 220 Ill. App. 83, 86.) There was no evidence tending to show that the defendant company had waived this particular clause of the policy. And we do not think that the trial court committed any errors in rulings on evidence as warrant a reversal of the judgment.

Accordingly, the judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes, P.J., and Fitch, J., concur.

[illegible]

219 - 30480

FREDERICK G. HEINZE and
ERNEST WEINSHEIMER,
individually and as
copartners, doing business
as F. Heinze & Co. and
Weinsheimer Tanning Co.,
Appellees.

v.

GENERAL ACCIDENT, FIRE AND
LIFE ASSURANCE CORPORATION,
ITS.,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

241 I.A. 615

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced on November 24, 1919, and based upon an "Illinois Workmen's Compensation policy" of insurance, limited to \$5,000 in case of injury or death of one employee and issued to plaintiffs under the name of F. Heinze & Co. on April 22, 1916, there was a trial without a jury, and, on June 22, 1925, the court found the issues in plaintiffs' favor and entered judgment against defendant company for \$5,000. This appeal followed.

On the trial it was agreed by the respective attorneys that, in lieu of introducing evidence as to the accident, the original record, filed in the Supreme Court in cause No. 12,639, Heinze v. Industrial Commission, be introduced in evidence, and that either party might introduce additional evidence. Such record was introduced, also additional evidence by plaintiffs. It was further stipulated that plaintiffs had paid the award of the Industrial Commission amounting, with interest and costs, to \$3,644.56; that they also had paid interest on certain installments thereof amounting to \$560; also expenses of \$352.16, and also reasonable attorney's fees of \$500. The company's attorney did not question the correctness of the several amounts

but contended that plaintiffs were not entitled to recover any of them from the company.

In their declaration plaintiffs set forth verbatim the policy and the attached schedule, and alleged in substance that, by its provisions and subject to its conditions, the company agreed, for a period of one year from April 22, 1916, to indemnify them against loss arising from legal liability for damages on account of bodily injury or death suffered by their employees, resulting from any accident arising out of and in the course of their employment, provided that the company's liability in respect to the injury or death of any one employee should not exceed \$5,000; that on June 7, 1916, one Fred Krings, while in plaintiffs' employ as a teamster, was injured in an accident in the course of his employment and thereafter died from his injuries; that the administratrix of his estate claimed damages from plaintiffs, and subsequently, the company undertook the defense to her suit before the Industrial Board of Illinois, where she recovered an award of \$3500, together with interest and costs; that the company, not regarding its obligation to continue the defense of the suit to final judgment, failed and neglected to prosecute an appeal from the award to the Circuit court or, upon affirmance, to the Supreme Court, where the award finally was affirmed (288 Ill. 342), plaintiffs themselves prosecuting said appeals and expending thereby necessary costs, attorney's fees, interest, etc., including the award, which they paid in full, the total sum of \$5000; and that plaintiffs had complied with all the terms and conditions of the policy. The ad damnum of the declaration was \$5000.

The company filed a plea of the general issue, and gave notice of special matters of defense that the policy was issued to "F. Heinze & Co.," which reported the accident as one happening to one of its employees; that the company, as required by the policy, defended the suit brought against it before the Illinois

was removed or reduced you were effectively self-administered and

1950

...for the purpose of ...

the policy and the attached schedule, was assigned in substance
that, by the provisions was subject to the conditions, the company
agreed, for a period of one year from April 22, 1910, to indemnify
them against loss arising from legal liability for damages on
account of bodily injury or death suffered by their employees,
resulting from any accident arising out of and in the course of
their employment, provided that the company's liability in respect
to the liability or death of any one employee should not exceed \$5,000;
that on June 7, 1910, the West Virginia, while in Westville, employ

equipment and hardware used from his inventory; that the maintenance records of his vehicle showed repairs from his insurance company; that the company's policies and terms do not allow them to provide copies of records; that the company was contacted by letter to obtain records and located and noted that the equipment was maintained as required; that the history of the vehicle at the time it was sold was obtained; that the vehicle was inspected by police and found to be in good condition; that the vehicle was found to be in good condition; that the vehicle was found to be in good condition.

...and
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... ..
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Industrial Board "until said Board decided that the deceased, Brings, was not an employee of F. Heinze & Co. but an employee of the Weinsheimer Teaming Co., and dismissed as to F. Heinze & Co. and held the Weinsheimer Teaming Co.;" and that, F. Heinze & Co. having been dismissed from the proceedings, defendant company had no further interest therein.

The sole point, relied upon by counsel for the company for a reversal of the judgment, is in substance that, "for the purposes of insurance," F. Heinze & Co. and Weinsheimer Teaming Co. were "separate and distinct entities" and that insurance, written for the former concern and its employees, did not cover employees of the latter concern.

The following facts in substance were disclosed by the evidence: For many years plaintiffs had been associated together in a produce commission business - Heinze as owner and Weinsheimer as an employee. About two years prior to March, 1916, they became partners in the business - Weinsheimer getting one-fourth of the profits. About March 6, 1916, prior to the issuance of the policy in question, they entered into an agreement whereby they became equal partners in the business, under the firm name ^{of} F. Heinze & Co., and located at 175 West South Water Street, Chicago. It was arranged that they should do a teaming business at the same location, in addition to the produce commission business, under the name of Weinsheimer Teaming Co. The teaming department of the business was conducted under this separate name, because it was thought more teaming business might thereby be obtained from competitors in the commission business. Separate checks and separate bank accounts were used for said department, and a separate set of books was kept. This was done, according to Weinsheimer's testimony for the purpose of ascertaining if the department was paying. One bookkeeper kept both sets of books. In the schedule of the policy the name of the assured is ^{stated} to be "F. Heinze & Co.,"

1. The first of these is the fact that the system is not a simple one, and that the results are not always the same. The second is that the system is not a simple one, and that the results are not always the same.

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at the University of California, Berkeley

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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is a positive definite matrix \mathbf{A} and \mathbf{b} is a vector.

and an independent, third-party review of the project is planned for 2004.

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STANDARD FORM NO. 64 (Rev. 1-60)

Head of the State has ordered the arrest of the following persons:

2025 RELEASE UNDER E.O. 14176

Approved: _____ Date: _____

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a copartnership, located at 175 West South Water Street, Chicago. The individual names of the two partners do not appear in the policy. It is stated in the schedule that the kind of trade, business or occupation covered was "hauling produce and light merchandises, drivers and drivers' helpers only." The advance premium was \$17.50, and the check to pay the same, as well as checks to pay for subsequent audits, were drawn against the bank account of the teaming department, were payable to the order of defendant's Chicago agents, and were signed "Weinsheimer Teaming Co., by F. Heinze." The teams used and drivers employed by plaintiffs were used and employed only in the teaming department. As to further facts disclosed by the evidence, reference is made to the opinion of the Supreme Court. (Heinze v. Industrial Commission, 288 Ill. 342, 343, 345.)

After a review of the evidence, and the holdings in said Heinze case, we do not think that there is any merit in counsel's contention above mentioned. There was only one partnership. In the Heinze case, (p. 346) it is said: "The claim for compensation was against F. Heinze and Ernest Weinsheimer. A partnership is not a legal entity separate and distinct from the persons composing it (Abbott v. Anderson, 265 Ill. 285); and it makes no difference that the same parties are engaged in two different lines of business under different partnership names, - there is in law but one partnership. (Campbell v. Colorado Coal & Iron Co., 9 Colo. 60.)" Some of the cases cited by counsel in support of his contention arise in jurisdictions where the theory, that a partnership is a legal entity, is recognized. In Abbott v. Anderson, 265 Ill. 285, 290, it is said: "The theory that a partnership is a legal entity distinct from and independent of the persons composing it has never been recognized in the law of this State." From the evidence contained in the present record we think that the plaintiffs, under the terms of the policy in question, were insured against just

The first of these is the fact that the evidence in the case is not only in the possession of the Government but is also in the possession of the public. The second is the fact that the evidence is not only in the possession of the Government but is also in the possession of the public. The third is the fact that the evidence is not only in the possession of the Government but is also in the possession of the public.

such a liability as it was shown they were subjected to, and that the defendant company should reimburse plaintiffs for the amount of the original award of \$3,500, interest and costs, paid by them, and also for their expenses and attorney's fees mentioned, subject to the limit of the \$5000 ad damnum of their declaration. It is provided in the policy that the company "agrees to defend, in the name of and on behalf of the assured, any suits brought by any employee, * * or his representatives, for damages against the assured * *; and, in such event, * * further agrees to pay, irrespective of and in addition to the limits of the Policy * *, all costs taxed against the assured in any legal proceeding defended by the Corporation (defendant), all interest accruing after entry of judgment upon such part of said judgment as the Corporation is obligated to pay under the Policy, * * together with all expenses incurred by the Corporation growing out of the investigation of the accident, the adjustment of any claim or the defense of any suit, resulting therefrom." Because of the company's refusal to defend the suit brought against plaintiffs in the circuit and Supreme courts, under a mistaken view of the law and facts, we think plaintiffs' expenses and attorney's fees mentioned, of the correctness of the amounts of which no question was raised, were included properly in the finding and judgment.

Our conclusion is that the judgment rendered by the Circuit court against the defendant company and in favor of plaintiffs should be affirmed. It is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

289 - 39551

RICHARD A. PICK, Plaintiff,

v.

MARTIN REYMAN, Defendant,

and

STATE MUTUAL LIFE ASSURANCE
COMPANY OF WORCESTER,
MASSACHUSETTS, a corporation,
Garnishee.

514
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

241 I.A. 615

PER CURIAM.

This is an appeal from an order denying motions to vacate a judgment and to strike from the record a certain alleged amended answer of the garnishee. The case was consolidated with Gen. No. 30397, and for the reasons stated in the opinion filed in that case, the order appealed from is reversed.

REVERSED.

CONTINENTAL & COMMERCIAL NATIONAL
BANK OF CHICAGO, a Corporation,
Appellee,

vs.

ISRAEL PERLMAN and MORRIS PERLMAN,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 611

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff in the trial court is a national bank. It sued defendants, Israel Perlman and Morris Perlman, upon certain promissory notes described in the special counts of the declaration, to which were attached the common counts and an affidavit setting forth the nature of plaintiff's claim and alleging that there was due, after allowing all credits, etc., the sum of \$77,560.35.

The defendants filed a plea of the general issue with an affidavit of merits, and afterwards special pleas of want of consideration, failure of consideration, misrepresentation and fraud, and a plea of set-off. There were replications by the plaintiff to the special pleas, and the parties submitted evidence in support of their respective contentions to the jury.

Before the close of the evidence the defendants made a motion to dismiss the case upon the theory that the evidence tended to show that plaintiff had been guilty in the transaction here in controversy of trading with an enemy country, contrary to the laws of the United States of America, and while the United States of America was at war, and that the claim in the suit was based upon acts of the plaintiff, contrary to the public policy and welfare of the United States of America. Upon that ground also the defendants moved to instruct the jury to find the issues for

CHARTERED BY THE NATIONAL BUREAU OF INVESTIGATION
CHICAGO, ILLINOIS
JANUARY 1910

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CHICAGO, ILLINOIS
JANUARY 1910

RECEIVED BY THE NATIONAL BUREAU OF INVESTIGATION
CHICAGO, ILLINOIS
JANUARY 1910

The plaintiff in the trial court is a national bank.
It sued defendants, Isaac Foxman and Morris Foxman, upon cer-
tain promissory notes described in the special counts of the de-
claration, the notes were attached to the common counts and an affidavit
swearing to the nature of plaintiff's claim and alleging that
there was due, after allowing all credits, etc., the sum of

The defendants filed a plea of the general issue with
an affidavit of merits, and afterwards special pleas of want of
consideration, failure of consideration, misrepresentation and
fraud, and a plea of set-off. There were replications by the
plaintiff to the special pleas, and the parties submitted evidence
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States of America was at war, and that the claim in the suit was
based upon acts of the plaintiff, contrary to the public policy and
interest of the United States of America. Upon that ground also
the defendants moved to dismiss the case.

the defendants, both of which motions were denied.

At the close of all the evidence plaintiff presented a written motion to exclude the evidence from the consideration of the jury, to instruct the jury to find the issues for the plaintiff, and to assess the damages for the plaintiff at the sum of \$83,662.69. This motion was granted, the verdict returned and the court, over-ruling motions of defendants for a new trial and in arrest, entered judgment against the defendants for the amount named in the verdict. This judgment defendants by this appeal seek to reverse.

The evidence tended to show that Perlman & Company is a corporation of the State of New York, and that about the time of the transaction in controversy it contemplated the purchase, shipment to and sale in Europe of certain foodstuffs; that particularly Perlman & Company had in mind the shipment of certain foodstuffs to Lithuania, which was at that time a part of the German Empire, with which the United States was then at war.

It was unnecessary that this defense should be put in issue by pleas, since if it appeared from the evidence that the fact alleged existed, the court would of its own motion dismiss the action on the grounds of public policy. Oscanyan v. Arms Co., 103 U. S. 266; Coppell v. Hawes Co., 7 Wall. 557; Jones v. U. S., 137 U. S. 202.

Further, the courts of Illinois and of the United States will take judicial notice of the laws, proclamations and official acts of the executive departments from which the existence of any such defense might be inferred. Jones v. U. S. supra; Underhill v. Hernandez, 168 U. S. 250; Spring v. Telegraph Co., 10 A. L. R. (Ann.) 952; Nankivel v. Omsk All Russian Gov., etc., 237 N. Y. 150; Fishman v. West Side National Bank of Chicago,

the defendants, both of which motions were denied.

At the close of all the evidence plaintiff presented

a written motion to exclude the evidence from the consideration

of the jury, to instruct the jury to find the issues for the

plaintiff, and to assess the damages for the plaintiff at the sum

of \$25,000.00. This motion was granted, the verdict returned

and the court, overruling motions of defendants for a new trial

and in arrest, entered judgment against the defendants for the

amount named in the verdict. This judgment defendants by this

appeal seek to reverse.

The evidence tended to show that Farnham & Company

is a corporation of the State of New York, and that about the

time of the transaction in controversy it contemplated the pur-

chase, shipment to and sale in Europe of certain foodstuffs; that

particularly Farnham & Company had in mind the shipment of certain

foodstuffs to Lithuania, which was at that time a part of the

German Empire, with which the United States was then at war.

It was unnecessary that this balance should be put in

issue by plea, since it appeared from the evidence that the

fact alleged existed, the court would of its own motion dismiss

the action on the grounds of public policy. Quinn v. Iowa Co.

127 U. S. 208.

Further, the courts of Lithuania and of the United

States will take judicial notice of the laws, proclamations and

official acts of the executive departments from which the evi-

dence of any such defense might be inferred. Jones v. U. S.

127 U. S. 208.

Quinn v. Iowa Co.

229 Ill. App. 315.

That the transactions which appear in evidence, including the making of a loan and the execution of a guaranty ^{if} for the purpose of financing the purchase of supplies for an enemy country, would be a violation of the act against trading with an enemy, there is no doubt. U. S. Comp. Stat. No. 1, 1919, Sec. 3115½, AA 701; U. S. Stat. 1919, Compilation, Supp. No. 1, Sec B 3115½ AA; Springer v. Garvin, 276 Fed. 595; 278 Fed. 27; vol. 1, Stat. of 1916, 1923 Supp., p. 1057, Sec. 3115½; Ill. C. C. A. 231 Fed. 804.

This defense was presented upon oral argument with an earnestness which would have been convincing if there had been facts in the record on which to base the argument. Such facts do not appear, but, on the contrary, an examination of the record discloses that all parties to the transaction contemplated that before any such shipment to Lithuania should be made, a permit from the government of the United States would be obtained. In view of that fact we cannot assume that citizens of this country would be guilty of so heinous an offense. Guilt of that kind will not be presumed. The determination of the question raised by defendants' motion raised a question of law, and the court did not err in denying the motion.

The affidavit of merits sets up as a defense that on or about April 4, 1919, plaintiff procured the defendants to sign a certain instrument of guaranty in the sum of \$100,000 to guarantee the plaintiff from loss upon a transaction then proposed to be carried out between Perlman & Company and the government of Lithuania; that the said proposed transactions fell through and the plaintiff never advanced any moneys to Perlman & Company in connection with it, and that said guaranty became and was extinguished and of no force and effect; that defendants had business relations

with the bank many years prior to the execution of the guaranty and had full faith in its honesty and integrity and in the honesty and integrity of its officers and employees; that after the abandonment of the transaction defendants believed that the guaranty had been cancelled and destroyed by plaintiff; that thereafter Perlman & Company took up certain other and distinct transactions with the plaintiff and the plaintiff made advances of money to Perlman & Company in connection therewith; that the guaranty was not intended to stand as security for these, and that defendants had no knowledge of these matters, but that Perlman deposited with plaintiff drafts, bills of lading, shipping papers and warehouse receipts as security for these transactions and advances, which were wholly unknown to defendants.

That on or about February 27, 1920, defendants received notice from plaintiff that Perlman & Company was indebted to it in the sum of \$101,538.52, and that plaintiff would hold defendants liable upon the guaranty for the amount of the indebtedness. Defendants protested to plaintiff that the guaranty had been given to cover but one transaction, and had been so understood by the parties; that the guaranty had become inoperative by reason of the failure to consummate the transaction, and defendants had no knowledge of the advances plaintiff had been making to Perlman & Company and had never authorized the making thereof, and further, that they were advised that the bank held collateral much more than sufficient to cover the indebtedness claimed to be due from Perlman & Company; that thereupon defendants were informed by plaintiff that these things did not matter, that it desired to get rid of said collateral and would put defendants out of business and destroy their credit if they did not forthwith execute their note, payable to its order in the sum of \$101,538.52 with collateral; that de-

THE BANK

with the bank many years prior to the execution of the guaranty and had full faith in its honesty and integrity and in the honesty and integrity of its officers and employees; that after the abandonment of the transaction defendants believed that the guaranty had been cancelled and destroyed by plaintiff; that thereafter Plaintiff took up certain other and distinct transactions with the plaintiff and the plaintiff made advances of money to Plaintiff & Company in connection therewith; that the guaranty was not intended to extend as security for these, and that defendants had no knowledge of these matters, but that Plaintiff deposited with plaintiff drafts of cash, shipping papers and various receipts as security for these transactions and advances, which were wholly unknown to defendants.

That on or about February 27, 1930, defendants received notice from plaintiff that Plaintiff & Company was indebted to it in the sum of \$101,533.52, and that plaintiff would hold defendants liable upon the guaranty for the amount of the indebtedness. Defendants protested to plaintiff that the guaranty had been given to cover but one transaction, and had been so understood by the parties; that the guaranty had become inoperative by reason of the failure to consummate the transaction, and defendants had no knowledge of the advance plaintiff had been making to Plaintiff & Company and had never authorized the making thereof, and further, that they were advised that the bank held collateral much more than sufficient to cover the indebtedness claimed to be due from Plaintiff & Company; that therefore defendants were informed by plaintiff that these things did not matter, that it desired to get rid of said collateral and would not defendants out of business and destroy their credit if they did not forthwith execute their note, payable to its order in the sum of \$101,533.52 with collateral; that the

defendants were in business and in need of credit, and that upon the renewal of these threats several times and upon the announcement by plaintiff that it was about to take action, defendants consented to execute the note, if plaintiff would turn over to them all the collateral held by it for the indebtedness of Perlman & Company, which the plaintiff undertook and promised to do, and agreed it would permit the defendants to handle said collateral as they saw fit in disposing of the merchandise represented by it; that thereupon defendants made, executed and delivered to plaintiff a promissory note for said amount, bearing date March 2nd, payable to the order of plaintiff and secured by certain collateral described therein; that therefor defendants were forced to and had paid the sum in the neighborhood of \$30,000 on account of interest and principal of the said note and renewals thereof, which were executed under the same conditions and on account of the same threats and promises as the original note.

That the drafts, bills of lading, shipping papers and warehouse receipts held by plaintiff as collateral for the indebtedness due it from Perlman & Company, represented large quantities of merchandise and foodstuffs which Perlman & Company had caused to be shipped from the United States to Europe and were then in storage in warehouses in Great Britain, Holland, Denmark, Norway and Germany, and were salable in many parts of Europe. Defendants had relatives and business connections in Europe and particularly in Holland and Germany, who were equipped to care for the sale of said goods; that defendants at once proceeded to arrange for the sale of the goods through their relatives and business associates, and did arrange therefor and did make certain sales, but the plaintiff, though often requested, wholly refused to turn over to defendants the drafts, bills of lading, shipping papers or warehouse receipts, which evidenced the title to said merchandise, and

tenants were in business and in need of credit, and that upon the renewal of these threats several times and upon the management by plaintiff that it was about to take action, defendants consented to execute the note, it plaintiff would turn over to them all the oil later held by it for the indebtedness of Petroleum & Company, which

the plaintiff understood and promised to do, and agreed it would permit the defendants to handle said collateral as they saw fit in disposing of the merchandise requested by it; that thereupon defendants made, executed and delivered to plaintiff a promissory note for said amount, bearing date March 2nd, payable to the order of plaintiff and secured by certain collateral described therein; that thereafter defendants were forced to and had paid the sum in the neighborhood of \$30,000 on account of interest and principal of the said note and renewals thereof, which were executed under the same conditions and on account of the same threats and promises as the original note.

That the drafts, bills of lading, shipping papers and warehouse receipts held by plaintiff as collateral for the indebtedness due it from Petroleum & Company, represented large quantities of merchandise and commodities which Petroleum & Company had caused to be shipped from the United States to Europe and were then in storage in warehouses in Great Britain, Holland, Denmark, Norway and Germany, and were salable in many parts of Europe. Defendants had relatives and business connections in Europe and particularly in Holland and Germany, who were equipped to care for the sale of said goods; that defendants at once proceeded to arrange for the sale of the goods through their relatives and business associates, and did arrange to sell and did make certain sales, but the plaintiff, though often requested, wholly refused to turn over to defendants the drafts, bills of lading, shipping papers or warehouse receipts, which evidenced the title to said merchandise, and

refused to permit the representatives of defendants or prospective purchasers thereof to withdraw samples of said merchandise from the warehouse wherein it was stored, and refused to permit delivery of merchandise of which defendants' representatives did dispose, and persisted in keeping the said merchandise stored in warehouses and under insurance and other charges, which storage, insurance and other charges were greatly in excess of those for which the representatives of these defendants could have obtained the service; that the plaintiff never turned over the drafts, bills of lading, shipping papers and warehouse receipts, and that by reason of the conduct of the plaintiff in these respects defendants were wholly prevented from disposing of the merchandise, much of which had become spoiled and worthless and the remainder greatly depreciated in value by reason of becoming aged and stale and by reason of market conditions and the fluctuations in and depreciation of foreign exchange, and particularly of the German Mark, and said merchandise had become an almost total loss; that had it not been for the failure of the plaintiff to keep its said promise, made at the time of and as part of the making of the note first above described, defendants could and would have disposed of said merchandise for a sum greatly in excess of \$100,000.

It was further averred that neither defendants, nor either of them, had any financial interest in or connection with Berlaun & Co.

There is no doubt of the rule of law which should have been applied in determining whether the cause should be submitted to the jury. If there was any evidence when considered with all its inferences in the most favorable light for the defendants, a jury might reasonably find in favor of the defendants on a material issue, then a motion for such an instruction should have been denied; otherwise, it should have been given. Libby, McNeill &

refused to permit the representatives of defendants or prospective
purchasers thereof to withdraw samples of said merchandise from
the warehouse wherein it was stored, and refused to permit delivery
of merchandise of which defendants' representatives did dispose,
and permitted in keeping the said merchandise stored in warehouse
and under insurance and other charges, which storage, insurance and
other charges were greatly in excess of those for which the repre-
sentatives of these defendants could have obtained the service; that
the plaintiff never turned over the drafts, bills of lading, ship-
ping papers and warehouse receipts, and that by reason of the con-
duct of the plaintiff in these respects defendants were wholly
prevented from disposing of the merchandise, much of which had
become spoiled and worthless and the remainder greatly depreciated
in value by reason of being aged and stale and by reason of mar-
ket conditions and the fluctuations in and depreciation of foreign
exchange; and particularly of the German Mark, and said merchandise
had become an almost total loss; that had it not been for the fail-
ure of the plaintiff to keep its said promise, made at the time of
and as part of the making of the note first above described, defend-
ants could and would have disposed of said merchandise for a sum
greatly in excess of \$100,000.

It was further averred that neither defendant, nor
either of them, had any financial interest in or connection with
Karlmann & Co.

There is no doubt of the rule of law which should have
been applied in determining whether the cause should be submitted
to the jury. If there was any evidence when considered with all
the inferences in the most favorable light for the defendants, a
jury might reasonably find in favor of the defendants on a material
issue, then a motion for such an instruction should have been
denied; otherwise, it would have been given. Wright, McDaniel &

Libby v. Cook, 222 Ill. 206; Halley v. Robison, 233 Ill. 614; Bechtel v. Marshall, 283 Ill. 486.

The defendants contend that it was error to instruct the jury to return a verdict for plaintiff, because there was evidence tending to show that a part of the collateral deposited by the defendants with the notes sued on had not been either collected or returned to the defendants by the bank prior to the beginning of the suit. This defense was not set up in the affidavit of merits, and therefore defendants were precluded from offering evidence tending to prove it.

It is undoubtedly the rule that such a defense is admissible under the general issue by way of recoupment, as is held in many cases cited, such as Benes v. The Bankers Life Insurance Co., 232 Ill. 236; Wilson et al. v. King, 83 Ill. 232; but this does not not relieve the defendants from setting up such defense in their affidavit of merits. Radison v. Fortune Bros. Brewing Co., 163 Ill. App. 276; Allen et al. v. Watt, 69 Ill. 657; Harrison v. Thackaberry, 248 Ill. 512; Clinton Co. v. Stiles, 197 Ill. App. 505; McClintock v. Lake Forest University, 222 Ill. App. 468; Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill. App. 34.

It was not necessary in the first instance for plaintiff to affirmatively prove that the proceeds of the collateral had been applied on the note or that the collateral deposited with the note had been returned to defendants, as defendants seem to suppose.

Defendants cite Manufacturers State Bank v. American Surety Co., 230 Ill. App. 474, and Rockford Metal Specialty Co. v. Wester, 234 Ill. App. 260, to the point that such affirmative evidence was necessary in order to make a prima facie case for the plaintiff. In the first of these cases it was held that in an action on a bond where the declaration averred unnecessarily that a notice required to be given had been waived by the defendant, it was necessary for the plaintiff to affirmatively establish that fact.

Libby v. Cook, 223 Ill. 200; Kelley v. Robinson, 225 Ill. 614;
Heckler v. Marshall, 225 Ill. 499.

The defendant contends that it was error to instruct the jury to return a verdict for plaintiff, because there was evidence tending to show that a part of the collateral deposited by the defendant with the notes sued on had not been either collected or returned to the defendant by the bank prior to the beginning of the suit. This defense was not set up in the affidavits of merits, and therefore defendants were precluded from offering evidence tending to prove it.

It is undoubtedly the rule that such a defense is available under the general issue by way of recoupment, as is held in many cases cited, such as Hogan v. The Bankers Life Insurance Co., 222 Ill. 226; Wilson et al. v. King, 221 Ill. 222; but this does not entitle the defendant to set aside the verdict in such cases in the affidavits of merits. Kashner v. Farmers Loan & Trust Co., 185 Ill. App. 278; Allen et al. v. East, 221 Ill. 227; Harmon v. Theobald, 221 Ill. 212; Chicago Co. v. Stiles, 221 Ill. App. 200; McClintock v. Lake Forest, 221 Ill. App. 488; Edward Tool Co. v. Green, 221 Ill. App. 54.

It was not necessary in the first instance for plaintiff to affirmatively prove that the proceeds of the collateral had been applied on the note or that the collateral deposited with the note had been returned to defendant, as defendants seem to suggest. Defendants cite Wheeler v. Wheeler, 220 Ill. App. 474, and Heckler v. Marshall, 225 Ill. App. 499, to the point that such affirmative evidence was necessary in order to set aside the verdict in an action on a bond where the fact of non-payment was necessary to the plaintiff's case. In the first of these cases it was held that in an action on a bond where the fact of non-payment was necessary to the plaintiff's case, it was necessary for the plaintiff to affirmatively establish that fact.

as pleaded, and this on authority of Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240.

In the second case it was held that in an action upon a subscription of stock of a corporation, it was necessary for plaintiff to prove affirmatively that a call for payment and a demand were necessary by reason of certain sections of the Corporation Act. No such question as was decided in either of these cases is presented by the pleadings in this case. If defendants intended to rely upon their right to recoup on the grounds mentioned, they should have given due notice to the plaintiff of that fact, by setting up the defense in their affidavit.

We will add, however, that after an examination of the evidence, we are satisfied that there is no evidence from which a jury could have reasonably found that any such defense had been established, even if it had been properly set up in the affidavit of merits.

It is also contended that the instruction for plaintiff should not have been given because there was evidence tending to show that plaintiff had been negligent in the handling of shipments for Perlman & Co., and that this negligence resulted in loss. This supposed defense was set up in the affidavit of merits, and if there was any evidence from which the jury could reasonably find that it was sustained was undoubtedly available to the defendants. Waterman v. Clark et al., 76 Ill., 428; Hall, Admr. et al. v. Hoxsey et al., 84 Ill. 616; Kerck White Lead Co. v. McGahey, 159 Ill. App. 412.

It is suggested by defendants that plaintiff was negligent in failing to promptly submit instructions, as requested, by its correspondent banks to issue samples of commodities; that consignees were unable to give such orders for sampling and inspec-

as pleaded, and this on authority of People v. Baker, 125 Ill. 400.

In the present case it was held that in an action upon a corporation of stock or a corporation, it was necessary for plaintiff to prove affirmatively that a call for payment and a demand were necessary by reason of certain sections of the Corporation Act. No such question as was decided in either of these cases is presented by the pleadings in this case. It is incumbent upon the defendant to rely upon their right to remove on the grounds mentioned, they should have given the notice to the plaintiff at that time, by setting up the defense in their affidavit.

We will add, however, that after an examination of the evidence, we are satisfied that there is no evidence from which a jury could have reasonably found that any such defense had been established, even if it had been properly set up in the affidavit.

It is also contended that the instruction for plaintiff would not have been given because there was evidence tending to show that plaintiff had been negligent in the handling of assignments for payment &c., and that this negligence resulted in loss. This supposed defense was not set up in the affidavit as matter, and if there was any evidence from which the jury could reasonably find that it was sustained was undoubtedly available to the defendant.

It is suggested by defendant that plaintiff was negligent in failing to promptly submit instructions, as requested, by the court. It is held that it is the duty of the plaintiff to submit instructions promptly, and that failure to do so constitutes negligence. It is held that the plaintiff's failure to do so in this case constitutes negligence, and that the defendant is entitled to a judgment in its favor.

tion, but even if it is conceded that there is some evidence tending to show negligence in this respect, there is not a scintilla of evidence tending to show that any such negligence caused injury, or a scintilla of evidence tending to show the amount of damages, or any basis whatsoever for the assessment of damages on account of it. If there is any such evidence in the record, the defendants have failed to point it out, and this court, as has often been stated, does not search the record to find evidence upon which it may reverse.

In the original brief defendants complain that the trial court excluded evidence tending to show the agency of the correspondent banks in Europe. The ruling complained of, however, was not pointed out. The plaintiff in reply, suggesting a possible slip of memory, by defendants, ^{they} in their reply brief refer to pages 177 and 179 of the abstract. We have carefully examined these pages, however, without discovering that any such evidence was in fact excluded.

These points eliminated, the controlling question is whether oral evidence was admissible under the plea of want of consideration and failure of it, to show that the original guaranty was to be limited solely to such funds as the plaintiff bank might advance in connection with the proposed shipment of goods to Lithuania, and likewise ^{whether} ~~either~~ oral evidence was admissible to show the alleged agreement between the bank and Perlman & Company made after the execution of the guaranty that advancements made by plaintiff would be made without and not under the provisions of the guaranty. Although this evidence appears to be improbable in view of the situation, evidence tending to show these facts was admitted and afterwards stricken. As we have said, the question here is not whether the evidence was true or untrue, but whether taken with all favorable inferences for defendants, it disclosed a defense which

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ing to show negligence in this respect, there is not a scintilla
of evidence tending to show that any such negligence caused in-
jury, or a scintilla of evidence tending to show the amount of
damages, or any basis whatsoever for the assessment of damages on
account of it. If there is any such evidence in the record, the
defendants have failed to point it out, and this court, as has
often been stated, does not search the record to find evidence
which it may reverse.

In the original brief defendants complain that the
trial court excluded evidence tending to show the agency of the
defendants in Europe. The ruling complained of,
however, was not pointed out. The plaintiff in reply, suggesting
a possible slip of memory, by defendants, in their reply brief
refer to pages 177 and 178 of the abstract. We have carefully
examined these pages, however, without discovering that any such
evidence was in fact excluded.

These points eliminated, the controlling question is
whether oral evidence was admissible under the plea of want of
consideration and failure of it, to show that the original guaranty
was to be limited solely to such funds as the plaintiff bank might
advance in connection with the proposed shipment of goods to the
Caribbean, and likewise ^{whether} oral evidence was admissible to show the
alleged agreement between the bank and Western & Company made after
the execution of the guaranty that advancements made by plaintiff
were to be made without and not under the provisions of the guaranty.

Although this evidence appears to be inadmissible in view of the
situation, evidence tending to show these facts was admitted and
otherwise excluded. As we have said, the question here is not
whether the evidence was true or untrue, but whether taken with all
favorable inferences for defendants, it disclosed a defense which

should have been submitted to the jury.

The defendant contends that such evidence was admissible upon the theory that since the enactment of Section 9 of Chapter 98 of the Revised Statutes, entitled Negotiable Instruments, it is permitted in this state to vary by parol evidence the recital of the consideration in a written instrument, which it is claimed constitutes the consideration for notes sued upon. In support of this contention the defendants cite Baker v. Fawcett, et al., 69 Ill. App. 300; New York Life Insurance Co. v. Easton, 69 Ill. App. 479, and say that it has been expressly held in Hullen v. Harrison, 93 Ill. App. 669, that a contract of guaranty is within the terms of the statute. It is urged that the evidence stricken by the court tended to prove failure of consideration and want of consideration, as set up in the affidavit of merits and in the special pleas.

A statement of certain uncontradicted facts which appear in the evidence will tend to clarify the situation.

On April 4, 1919, plaintiff was engaged in the business of banking in the City of Chicago. Perlman & Company, a corporation, then recently organized in the State of New York, contemplated entering into certain transactions by which feedstuffs would be shipped to certain countries in Europe. The President of Perlman & Company was Mandel Perlman, then about twenty-two years of age. He was in the service of the army, and upon his discharge therefrom began to take an active interest in the affairs of Perlman & Company. His cousin, Aaron Perlman, then about thirty years of age, came to America from Germany in 1914, and had had some experience in the business of exporting. The defendants, Israel and Morris Perlman, twin brothers and uncles of these two young men, then lived in Chicago and were there engaged in business and were well and favorably known at the plaintiff bank.

On April 1, 1919, Aaron Perlman sent to his uncle

should have been admitted to the jury.

The following contents of the evidence were stated:

It is upon the theory that since the enactment of Section 7 of Chapter 88 of the Revised Statutes, entitled "Regulation of the Practice of the Profession of the Law," it is permitted in this state to vary by parole evidence the testimony of the corporation in a written instrument, which it is claimed constituted the corporation for notes and bonds. In support of this contention the defendant cites Baker v. Lovell, 111 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

A statement of certain uncontradicted facts which appear in the evidence will tend to clarify the situation.

On April 4, 1910, plaintiff was engaged in the business of banking in the City of Chicago. Plaintiff is a corporation, then recently organized in the State of New York, contemplated entering into certain transactions by which plaintiff would be shipped to certain countries in Europe. The President of Plaintiff is a company was a member of the firm, then about twenty-two years of age. He was in the service of the army, and upon his discharge therefrom began to take an active interest in the affairs of Plaintiff. His name, Aaron Perlman, then about thirty years of age, came to America from Germany in 1914, and had had some expert work in the business of exporting. The defendant, Pearlman and his wife, then lived in Chicago and were there engaged in business and were well known. Pearlman was at the plaintiff bank.

Israel at Chicago a night letter, which in substance stated that an alleged representative of the Lithuanian government had that day come to their office to confer upon a shipment which would amount to several million dollars, and asked his uncle to call on Mr. Rubenstein, manager of the foreign department of the plaintiff bank, and talk the matter over with him. On the same date he wrote a letter to his uncle Israel, enclosing a copy of the night letter and describing in detail the proposed transaction, stating that they would buy the meat and other foodstuffs and that the representative of the Lithuanian government would have to pay for them as soon as the goods were on the steamer; that he hoped the bank would give an excellent report upon inquiry from Washington, etc. Israel Perlman took this letter to Mr. Craft, vice-president of the plaintiff bank, who, as Israel Perlman testifies, said they would have to sign a guaranty for \$100,000 for the Lithuanian affair and called in Mr. McCurraoh of the foreign department. He says, "Mr. Craft said, 'If you will sign the guaranty, we will finance the deal.' Then he gave me a paper and I signed it. It was filled out before I signed it."

This guaranty is in writing and is in evidence, and its material parts are as follows:

"For value received and to enable Perlman & Company of 32 Broadway, New York, hereinafter designated as 'Debtor,' to obtain credit, from time to time, of the Continental and Commercial National Bank of Chicago, the undersigned hereby requests said Bank to extend, from time to time, to said Debtor such credit as said Bank may deem proper, and the undersigned hereby guarantees the full and prompt payment to said Bank at maturity and at all times thereafter, and also at the time hereinafter provided, of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced, to the extent of One hundred thousand & no Dollars, with interest at the rate of 7% per annum from maturity until paid; and the undersigned hereby also agrees to pay in addition thereto, all costs, expenses and reasonable attorney's fees at any time paid or incurred in endeavoring to collect said indebtedness, liabilities and obligations, or any part thereof, and in and about enforcing

Israel at Chicago a night before, which in substance stated that an alleged representative of the Lithuanian government had that day come to their office to confer upon a shipment which would amount to several million dollars, and asked his name to call on Mr. Nathan, manager of the foreign department of the plaintiff bank, and talk the matter over with him. On the same date he wrote a letter to his wife Israel, enclosing a copy of the night letter and stating in detail the proposed transaction, stating that they would pay the most and other obligations and that the representative of the Lithuanian government would have to pay for them as soon as the goods were on the steamer; that he hoped the bank would give an excellent report upon inquiry from Washington, etc. Israel's father took this letter to Mr. Grant, vice-president of the plaintiff bank, who, as Israel's father testified, said they would have to sign a guaranty for \$100,000 for the Lithuanian attack and called in Mr. Kucharsky of the foreign department. He says, "Mr. Grant said, 'If you will sign the guaranty, we will finance the deal.' Then he gave me a paper and I signed it. It was filled out before I signed it."

This guaranty is in writing and is in evidence, and its material parts are as follows:

"We have received and so Maria Barman & Company of 35 Broadway, New York, hereinafter denoted as 'Debtor,' to the said credit, from time to time, of the Continental and Commercial National Bank of Chicago, the undersigned hereby testifies that said bank has been proper, and the undersigned hereby guarantees to said bank and prompts payment to said bank at maturity and at all times thereafter, and also at the time hereinafter provided, of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and however before or after or hereafter created or arising or extended, to the extent of One Hundred thousand and no Dollars, with interest at the rate of 10 per annum from maturity until paid; and the undersigned hereby also agrees to pay in addition thereto, all costs, expenses and reasonable attorney's fees at any time said or incurred in endeavoring to collect said indebtedness, liabilities and obligations, or any part thereof, and in and about enforcing

this instrument. The liability hereunder shall in no wise be affected or impaired by (and said Bank is hereby expressly authorized to make, from time to time, without notice to anyone) any sale, pledge, surrender, compromise, release, renewal, extension, indulgence, alteration, exchange, change in, or modification of any of said indebtedness, liabilities and obligations, either express or implied, or any contract or contracts evidencing any thereof, or any security or collateral therefor. And the liability hereunder shall in no wise be affected or impaired by the acceptance by said Bank of any security for any of said indebtedness, liabilities and obligations, or by any disposition of, or failure, neglect, or omission on the part of said Bank to realize upon any of said indebtedness, liabilities and obligations, or upon any collateral or security for any or all of said indebtedness, liabilities and obligations, or by any application of payments or credits thereon. Said Bank shall have the exclusive right to determine how, when and what application of payments and credits, if any, shall be made on said indebtedness, liabilities and obligations, or any part of them. In order to hold the undersigned liable hereunder, there shall be no necessity or duty on the part of said Bank to report at any time for payment to said Debtor, or to any other person or corporation, or to all or any of said indebtedness, liabilities and obligations, or to any collateral, or security, or property whatsoever."

The writing also expressly waived diligence in collection and presentment for payment of any of the indebtedness or liabilities and collateral therefor, provided that the granting of credit from time to time by the Bank to the debtor in excess of the amount of the guaranty and without notice to the makers was authorized and should in no way affect or impair the guaranty; and further again:

"This guaranty shall be a continuing, absolute and unconditional guaranty, and shall remain in full force and effect until written notice of its discontinuance shall be actually received by said Bank, and also until any and all of said indebtedness, liabilities and obligations created before receiving such notice of discontinuance shall be fully paid. The death or dissolution of the undersigned shall not terminate this guaranty until notice of such death or dissolution shall have been actually received by said Bank, and also until all of said indebtedness, liabilities and obligations created before receiving such notice shall be fully paid."

On February 27, 1930, Mr. Vernon, the assistant cashier of the plaintiff bank, wrote Israel Perlman as follows:

"This is to advise you that the drafts, a list of which is herewith enclosed, drawn by Perlman and Company, New York City, on the various drawees in said list mentioned, on which the balance due us amounts to \$99,214.67, all remain unpaid, although all of them are long past due. Under the terms of the

the instrument. The liability hereunder shall in no wise be affected or limited by (and said bank is hereby expressly authorized to make, from time to time, without notice to anyone) any sale, pledge, mortgage, assignment, release, transfer, exchange, subordination, or other disposition of any or all of said indebtedness, liability and obligation, either known or unknown, or any contract or contract affecting any thereof, or any security or collateral thereto. And the liability hereunder shall in no wise be affected or limited by the assignment by said bank of any security for any or all of said indebtedness, liability and obligation, or by any disposition of, or failure, neglect, or omission on the part of said bank to realize upon any of said indebtedness, liability and obligation, or upon any collateral or security for any or all of said indebtedness, liability and obligation, or by any application of payments or credits to same. Said bank shall have the absolute right to determine how, when and what application of payments and credits it may, shall be made on said indebtedness, liability and obligation, or any part of them. In order to hold the maker liable under this agreement, there shall be no necessity or duty on the part of said bank to report at any time for payment to said holder, or to any other person or corporation, or to all or any of said indebtedness, liability and obligation, or to any collateral, or security, or property whatsoever.

The holder also expressly waived all claims in connection and agreement for payment of any of the indebtedness or liability and obligation hereunder, provided that the granting of credit from time to time by the bank to the debtor in excess of the amount of the guaranty and without notice to the maker was authorized and should in no way affect or impair the guaranty; and

Further again:

This guaranty shall be a continuing guaranty, and shall remain in full force and effect until written notice of its discontinuance shall be actually received by said bank, and also until any and all of said indebtedness, liability and obligation created before the receipt of such notice of discontinuance shall be fully paid. The death or bankruptcy of the maker shall not terminate this guaranty until notice of such death or bankruptcy shall have been actually received by said bank, and also until all of said indebtedness, liability and obligation created before receipt of such notice shall be fully paid.

On February 27, 1930, Mr. Vernon, the assistant cashier of the plaintiff bank, wrote Lewis Terman as follows:

"This is to advise you that the check, a list of which is attached, drawn by Terman and Company, New York City, on the various drawers in said list mentioned, on which the balance due no amount to \$25,214.87, all remain unpaid, although all of them are long past due. Under the terms of the

guarantee which was executed by you on the fourth of April, 1919, and delivered to us, we are obliged to request you to pay the amount due on said drafts and we hereby make demand for payment of that amount forthwith.

Yours very truly,

H. C. Vernon, Assistant Cashier."

Israel Perlman testified that when he received that letter he was surprised and expressed that surprise to Mr. Vernon, whom he went to see; that Vernon told him that if defendants didn't give notes, they would be put out of business; that they would close them up; that the bank examiner was pressing him for notes, and that they must have notes for that amount; at that time the defendants were indebted to the bank on other matters and owed money to other banks; that at the time the witness said that he refused to sign the note, but that Vernon said that he would like to go on a vacation and that he wanted them to come in and sign the notes; that two or three days thereafter, the defendants returned to the bank together; that Vernon again said that they would close up and put them out of business, and that the bank would not give them any more money, and after that conversation defendants signed a note dated March 2, 1920, due sixty days after date for the sum of \$101,538.52, depositing therewith certain collateral described in the note. When that note became due Israel Perlman again saw Vernon, who said, "You have got to renew these notes if you haven't got the money to pay them." To which Perlman replied that he would not give them another note, and recalled conversation on the first note; whereupon the defendants executed another note due in sixty days, and this note was from time to time renewed, less certain credits, until the two notes sued on were executed and delivered, upon maturity of which, the financial necessities of defendants having passed, they refused to pay and this suit followed.

The oral evidence given in behalf of the defendants tended to show an agreement of the plaintiff bank that credit to be extended to Perlman & Company by the bank should be limited to such

statements which was executed by you on the fourth of April, 1930, and delivered to me, we are obliged to request you to pay the amount of the said drafts and we hereby make demand for payment of that amount forthwith.
Yours very truly,
H. C. Vernon, Assistant Cashier.

Lester Foxman testified that when he received that letter he was surprised and expressed that surprise to Mr. Vernon, when he went to see; that Vernon told him that it belonged to him if he gave notes, they would be put out of business; that they would close them up; that the bank examiner was pressing him for notes, and that they must have notes for that amount; at that time the defendants were indebted to the bank on other matters and owed money to other banks; that at the time the witness said that he refused to sign the note, but that Vernon said that he would like to go on a vacation and that he wanted them to come in and sign the notes; that two or three days thereafter, the defendants returned to the bank together; that Vernon again said that they would close up and put them out of business, and that the bank would not give them any more money, and after that conversation defendants signed a note dated March 8, 1930, for sixty days after the sum of \$100,000, depositing therewith certain collateral described in the note. When that note became due Lester Foxman again saw Vernon, who said, "We have got to know these notes if you don't get the money to pay them." He told in Foxman replied that he would not give them another note, and recalled conversation on the first note; whereupon the defendants executed another note due in sixty days, and this note was then due to time renewed, less certain details, until the two notes and on were executed and delivered upon maturity of which, the financial investigation of defendants having passed, they refused to pay and this suit followed.

The oral evidence given in behalf of the defendants tended to show an agreement of the plaintiff bank that it would be extended to Foxman & Company by the bank should be limited to such

funds as might be necessary to finance the Lithuanian transaction and none other. Defendants testified ^{to} the conversations to that effect at the time and prior to the execution of the guaranty. Aaron Perlman also testified to oral conversations with officers of the plaintiff bank, tending to show that after the Lithuanian deal fell through plaintiff agreed that it would furnish to Perlman & Company the funds for other deals, independent of the guaranty and without liability being incurred under it.

evidence

The defendants contend that such ~~was~~ ^{is} admissible upon the theory that since the enactment of Section 9, Chapter 98 of the Revised Statutes of Illinois, entitled "Negotiable Instruments," it is permissible, as theretofore it was not permissible, to vary by parol evidence the recital of the consideration in another instrument, which is the consideration for an instrument sued on. On this point defendants rely on Baker v. Fawcett, supra; New York Life Insurance Co. v. Easton, supra, and other cases. While plaintiff contends on the authority of Chicago Sash Manufacturing Co. v. Haven, 195 Ill. 474, that the statute is not applicable to an instrument such as the guaranty which was executed between these parties. The statute seems to be framed upon the theory that a promissory note is only one part of an agreement, and that in order to get the whole agreement, parol evidence is necessary. On the same theory, the recital of a consideration in a written receipt given may be varied by parol evidence.

There are obvious limitations to this doctrine; otherwise, the rule would be entirely destroyed; where, for instance, the consideration is contractual in its nature, (22 Corpus Juris, 1169-71) or where parol evidence is offered to prove a purpose different from that expressed in the language of the contract, (22 Corpus Juris 1185) or where it is proposed to show that the instrument, which has in fact been delivered, shall not become operative until

...might be necessary to finance the litigation transaction
and some other. Defendants testified the conversation to that
effect at the time and prior to the execution of the guaranty.
Actor Foxman also testified to oral conversations with all three
of the plaintiff bank, tending to show that after the litigation
bank told Foxman plaintiff agreed that it would furnish as Foxman
a guaranty the funds for other debts, independent of the guaranty and
without liability being assumed under it.
The defendant contends that such was inadmissible when
the theory that since the enactment of Section 9, Chapter 93 of the
Revised Statutes of Illinois, entitled "Negotiable Instruments",
it is permissible, as therefore it was not inadmissible, to vary
by parol evidence the recital of the consideration in another in-
strument, which is the consideration for an instrument such as
on this point defendants rely on Banker v. Foxman, 1909-71
Ill. App. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 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1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407,

some condition has been performed, parole evidence is inadmissible.

It cannot, we think, be seriously contended that the evidence here offered would not vary any of the contractual terms of the guaranty. The oral evidence is to the effect that the bank was to advance money to be used exclusively in the Lithuanian deal. The guaranty, on the contrary, states that the defendants request plaintiff to give such credit to Perlman & Company as the bank may deem proper. By the terms of the writing the request is limited only by the discretion of the bank. By the oral evidence it is limited to a deal with a single country. If contracts of this sort could be thus varied, the business of the lender would be precarious indeed.

Again, the written terms of the guaranty provide that the guaranty shall be a continuing one and shall remain in force until written notice is given by the guarantors that it shall cease. The oral evidence introduced tends to show an agreement made with parties other than the signers of the guaranty that there should be no liability upon it at all. It would unduly extend this opinion to discuss and distinguish the cases cited in connection with this controversy, most of which are of course distinguishable; but we think the general principles which must be here applied are plain.

The defendants point out that the suit is not upon the guaranty, but upon the notes. That is true, and there is no question that under the statute want of failure of consideration may be shown by parole testimony; but defendants do not better their position by that observation, for the evidence shows that in connection with the execution and delivery of the first note the guaranty was surrendered and certain collateral, as agreed, turned over to the defendants, which was by them again pledged as collateral to the note. In each succeeding case when a new note was given, the prior note was surrendered, plaintiff giving up its legal rights under the

some condition has been performed, party's witness is inadmissible.
It cannot, we think, be seriously contended that the
evidence here offered would not vary any of the contractual
terms of the guaranty. The oral evidence is to the effect that
the bank was to advance money to be used exclusively in the litigation
in hand. The guaranty, on the contrary, states that the defendant
requested plaintiff to give such credit to Pearson & Company as the
bank may deem proper. By the terms of the writing the request is
limited only by the discretion of the bank. By the oral evidence
it is limited to a deal with a single country. It contrasts of this
sort could be thus varied, the business of the lender would be
prejudicially affected.
Again, the written terms of the guaranty provide that the
guaranty shall be a continuing one and shall remain in force until
written notice is given by the guarantors that it shall cease. The
oral evidence introduced tends to show an agreement made with parties
other than the signers of the guaranty that there should be no li-
ability upon it at all. It would hardly extend this opinion to dis-
miss and disregard the case cited in connection with this con-
troversy, most of which are of course distinguishable; but we think
the general principles which must be here applied are plain.
The defendants point out that the suit is not upon the
guaranty, but upon the notes. That is true, and there is no ques-
tion that under the statute want of failure of consideration may be
shown by parol testimony; but defendants do not better their posi-
tion by that observation, for the evidence shows that in connection
with the execution and delivery of the first note the guaranty was
introduced and certain collateral, as agreed, turned over to the
plaintiff. In such a proceeding as when a new note was given, the other
note was surrendered, plaintiff giving up its legal rights under the

instrument which was surrendered. Neither the guaranty nor any of the notes have been returned to the plaintiff.

We think the evidence here shows without contradiction that there was no want or failure of consideration for the notes upon which the suit is brought. The defendants owed the debt. The judgment is just and it is affirmed.

AFFIRMED.

Johnston and McGurely, JJ., concur.

testimony that was submitted. Witness the testimony not only of
the other party but also of the witnesses.
In fact the evidence was such that the
fact that was in fact at issue was established for the jury.
The fact was not in dispute. The defendant owed the debt.
The fact was not in dispute.

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WOMEN AND CHILDREN'S HOSPITAL OF
CHICAGO, a corporation,
Appellant,

v.

ROSE MARABIA and AARON R. WPPETIN,
Appellees.

} APPEAL FROM CIRCUIT COURT,
} COOK COUNTY.

} 241 I.A. 616

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree, dismissing for want of equity a bill filed by the complainant, praying that a judgment at law theretofore entered against it, in the Circuit court of Cook county, on April 9, 1920, for \$3550 in favor of Rose Marabia, in an action on the case for negligence, might be declared void, set aside and vacated; that defendants, pending the hearing of the cause, might be enjoined and restrained from collecting the judgment, and that upon the final hearing of the cause, said injunction might be made perpetual, and for other relief.

This case, in a different proceeding, has hitherto received consideration in this and in the Supreme Court. Marabia v. Thompson Hospital, 309 Ill. 157.

That was a proceeding in the nature of a motion, under section 89 of the Practice Act substituted for, but held to be substantially equivalent to the common law writ of error coram nobis.

The Supreme Court in substance held that the return of the sheriff could not be questioned in a proceeding of that nature, and that the conceded fact defendant was a charitable corporation did not exempt it from service of process or the necessity of entering its appearance and presenting its defense, if any, as other corporations; that defendant's remedy, if any, was by bill of equity.

WOMEN AND CHILDREN'S HOSPITAL OF
CHICAGO, a corporation,
Appellant,

vs.
JAMES H. HARRIS and LAWRENCE H. HARRIS,
Appellees.

COOK COUNTY.

APPEAL FROM CIRCUIT COURT.

2411 A. 616

THE HARRIS ESTATE

DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree, dismissing for want of equity a bill filed by the complainant, praying that a judgment at law theretofore entered against it, in the Circuit Court of Cook County, on April 9, 1930, for \$2500 in favor of Rose Harpale, in an action on the case for negligence, might be declared void, set aside and vacated; that defendants, pending the hearing of the cause, might be enjoined and restrained from collecting the judgment, and that upon the final hearing of the cause, said injunction might be made perpetual, and for other relief.

This cause, in a different proceeding, has hitherto received consideration in this and in the Supreme Court. Knox v. Thompson Hospital, 309 Ill. 137.

That was a proceeding in the name of a mother, under section 86 of the Practice Act substituted for, but held to be substantially equivalent to the common law writ of error coram nobis.

The Supreme Court in substance held that the return of the sheriff could not be questioned in a proceeding of that nature, and that the conceded fact defendant was a charitable corporation did not exempt it from service of process or the necessity of entering its appearance and presenting its defense, if any, as other corporations; that defendant's remedy, if any, was by bill of equity.

The judgment creditor insists that by bringing the former proceedings, complainant elected between two remedies and is now bound by such election; that the issues are res adjudicata and that plaintiff is guilty of laches in that this suit was delayed more than three years from the date of the judgment.

These contentions cannot be sustained. A party cannot in legal theory elect between two remedies, where as a matter of law he has only one, nor can issues be held to have been adjudicated in a proceeding where the court did not have jurisdiction to pass on them; nor does equity impute laches because an otherwise diligent litigant has delayed his suit by reason of a supposed remedy pursued in good faith in a court of law.

The complainant has here, as in the former proceeding, invoked the rule laid down in Parks v. Northwestern University, 218 Ill. 381, that a corporation organized for charitable purposes is not liable in a suit in tort brought by one receiving the benefits of the charity.

The briefs of the parties disclose a wealth of authority upon various phases of that question. Heriot's Hospital v. Ross, 12 Clark and F. 507, decided in 1848, 8 English Reprint, 1508, which, although followed by a majority of the courts of the United States has apparently, in principle, been overruled by the English courts in Wesley Docks v. Gibbs, (1866) L. R. 1 H. L. 943, which is followed in the later cases of Foreman v. Canterbury (1871) L. R. 6 Q. B. 214, 40 L. J. Q. B. N. S. 138; 24 L. T. N. S. 385, and Hillyer v. St. Bartholomew's Hospital (1909) 2 K. B. 820, 9 B. R. C. 1, 78 L. J. K. B. K. S. 958; 101 L. T. N. S. 368, 25 J. L. R. 762, and the cases collected in a note to Henry Roosen, Admr. v. Peter Bent Brigham Hospital, 235 Mass. 66, reported in 14 A. L. R. 563, are cited.

Consideration of that doctrine is not, we think, necessary to a decision here.

The judgment creditor insists that by bringing the
former proceedings, complaint filed between two remedies and
is now barred by such election; that the issues are res judicata
and that plaintiff is guilty of laches in that this suit was
delayed more than three years from the date of the judgment.
These contentions cannot be sustained. A party cannot
in legal theory elect between two remedies, where as a matter of
law he has only one. Nor can issues be held to have been ad-
judicated in a proceeding where the court did not have juris-
diction to pass on them; nor does equity require laches because an
otherwise diligent litigant has delayed his suit by reason of a
suggestion erroneously pressed in good faith in a court of law.
The complaint has here, as in the former proceeding,
involved the rule laid down in Parton v. Northwestern University,
118 Ill. 381, that a corporation organized for charitable purposes
is not liable in a suit in tort brought by one receiving the
benefit of the charity.
The briefs of the parties disclose a wealth of authority
upon various phases of that question. Hoxley's Hospital v. Hoxley,
121 Ill. 207, decided in 1881, is a leading English case.
Also, although followed by a majority of the courts of the United
States has apparently, in principle, been overruled by the English
courts in Wentley v. W. & A. Co. (1888) 12 Q. B. 104, which
is followed in the later cases of Wentley v. W. & A. Co. (1891)
11 Q. B. 214, 40 L. J. Q. B. 215; 24 L. T. R. 325.
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L. R. 325, and the cases collected in a note to Henry Hoxley,
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In this State such a corporation is not exempt from the service of process. It is necessary for it to present its defense, if it exists. The decision of the Supreme Court in the former proceedings is conclusive, we think, upon that phase of this litigation.

It follows that the controlling question in this case is whether the service of summons was sufficient to give the court, which rendered the judgment, jurisdiction. If it was, then the obligation was upon complainant to present its defense in the action of law, which failing to do, unless prevented by fraud, accident or mistake, it is precluded from obtaining the relief which it now seeks in a court of equity.

The facts disclosed by the evidence are that the summons issued to the sheriff of Cook County on June 23, 1919. It was returnable on the third Monday of September, 1919. The certificate of the sheriff of Cook County upon the back of the summons shows that it was received at 2:34 p. m. A notation on the summons also indicates that the sheriff's fee for service was paid in advance. The certificate of the clerk of the Circuit Court appears on the summons, showing that it was filed in his office on June 26, 1919, at 9:23 a. m. The return upon the back of the summons is as follows:

"Served this writ on the within named The Mary Thompson Hospital of Chicago for Women and Children, a corporation, by delivering a copy thereof to Frances Doody, Agent of said corporation, this 24th day of June, 1919. The President of said corporation not found in my County. Charles W. Peters, Sheriff, by Henry W. Langesch, Deputy."

The complainant contends that the return of the sheriff was false, and the judgment therefore void. It asserts that the return was false in two respects: (first) in that the statement of the sheriff, "the president of said corporation not found in my county," was false and untrue, and (secondly) that the statement in the return that Frances Doody was the agent of the corporation was false and untrue.

In this case a corporation is not exempt from the
 service of process. It is necessary for it to present its defense.
 It is obvious. The decision of the Supreme Court in the former
 proceedings is authoritative, we think, upon the question of this
 litigation.

It follows that the controlling question in this case is
 whether the service of summons was sufficient to give the court,
 which rendered the judgment, jurisdiction. It is well known that the
 obligation was upon complainant to present its defense in the action
 at law, which failing to do, unless protected by fraud, constitutes
 an admission. It is prohibited from obtaining the relief which it now
 seeks in a court of equity.

The facts disclosed by the evidence are that the summons
 issued to the sheriff of Cook County on June 25, 1919. It was re-
 turned on the third Monday of September, 1919. The certificate
 of the sheriff of Cook County upon the back of the summons shows
 that it was received at 8:54 p. m. A notation on the summons also
 indicates that the sheriff's fee for service was paid in advance.
 The certificate of the clerk of the Circuit Court appears on the
 summons, showing that it was filed in his office on June 26, 1919,
 at 9:25 a. m. The return upon the back of the summons is as follows:

"Served this writ on the within named The Mary Thompson
 Hospital of Chicago for women and children, a corporation,
 by delivering a copy thereof to Thomas Boddy, Agent of said
 corporation, this 24th day of June, 1919. The President of
 said corporation not found in my county. Charles W. Peters,
 Sheriff, by Henry W. Langstaff, Deputy."

The complaint contends that the return of the sheriff
 was false, and the judgment therefore void. It asserts that the
 return was false in two respects: (first) in that the statement
 of the sheriff, "the president of said corporation not found in
 my county," was false and untrue, and (secondly) that the cor-
 poration was false and untrue.

The burden of proof in both these respects was, of course, upon the complainant. The return of the sheriff was prima facie true, and it was necessary for the complainant to overcome that return by affirmative evidence, but the mere knowledge of the complainant of the existence of the suit would not constitute service of process. 15 Corpus Juris, 798-799; 15 Ruling Case Law, 852-853; Sanitary District v. Chapin, 226 Ill. 499, and if proper service of process was not had, complainant would not be negligent in failing to appear and defend the suit. Kochman v. O'Neill, 202 Ill. 110; Adams & Pigott Co. v. Allen, 310 Ill. 119.

Section 3 of the Practice Act provides:

"An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought. If he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county."

The complainant asserts that this statute is clear and unambiguous, and that no service can be had upon the agent if the president "can be found in the county in which the suit is brought."

On June 24, 1919, the affairs of the complainant corporation were conducted by a board of trustees elected by the members of the corporation. The officers of the corporation at that time were Mrs. Sara L. Hart, president, Randall W. Burns, vice-president, Mrs. Mary Campbell Taylor, secretary, and Albert Barge, treasurer. The only office and place of business which the corporation had was at the hospital, 1712 West Adams street.

The president, Mrs. Hart, was usually in the office of the corporation only once or twice a month to sign vouchers or to preside at a meeting of the trustees, and the vice-president, the treasurer and the secretary were there on those occasions only. While these officers were in Cook County, neither of them would have been found at the office of the corporation, except on one or two days during the month.

The burden of proof in both these respects was, of course, upon the complainant. The return of the sheriff was prima facie true, and it was necessary for the complainant to overcome that return by affirmative evidence, but the mere knowledge of the complainant of the existence of the suit would not constitute notice of process. In Corpus Juris, 788-789; 18 Willing Case Law, 683-685; Blackwell v. Smith, 228 Ill. 420, and it proper service of process was not had, complainant would not be negligent in failing to appear and defend the suit. Kachman v. O'Reilly, 302 Ill. 110; Adams & Smith Co. v. Allen, 310 Ill. 119.

Section 2 of the Practice Act provides:

"An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought. If he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, collector, principal director, engineer, conductor, station agent, or any agent of said company found in the county."

The complainant asserts that this statute is clear and unambiguous, and that no service can be had upon the agent if the president "can be found in the county in which the suit is brought."

On June 24, 1919, the affairs of the complainant corporation were conducted by a board of trustees elected by the members of the corporation. The officers of the corporation at that time were Mrs. Kate A. Hart, president, Randall E. Byrne, vice-president, Mrs. Mary Campbell Taylor, secretary, and Albert Hays, treasurer. The only office and place of business which the corporation had was at the hospital, 1712 West Adams street. The president, Mrs. Hart, was usually in the office at the corporation only once or twice a month so also whenever it is possible at a meeting of the trustees, and the vice-president, the treasurer and the secretary were there on these occasions only. While these officers were in Cook County, neither of them would have been found at the office of the corporation, except on one or two days during the week.

Burns, the vice president, testified that the meetings of the directors were usually held at his office and not at the hospital. The testimony of Mrs. Hart shows that she was at her home at Chicago, ^{Cook County,} Illinois, on the day the summons was served, and that she remained in Chicago continuously thereafter until January 15, 1920; that it was her custom to leave Chicago every Friday and to go to her country home and return to Chicago on the following Monday; that she was in Chicago continuously, except for these week-end visits throughout the summer; that June 24, 1919, was on Tuesday, and that on Wednesday, June 25, she presided at a board meeting of plaintiff corporation.

The evidence of the secretary, treasurer and vice-president of the plaintiff corporation is also to the effect that they were in Cook County at their respective homes, or offices, on June 24, 1919. The secretary remained in Chicago throughout the summer.

The deputy sheriff, Langosch, was called as witness for complainant and testified that he served the summons at the hospital of the complainant corporation on June 24, some time between a quarter of six and six-thirty; that he served other writs before he got to the hospital; that he left his office about a quarter past five, or thereabouts, and served two or three others before he served this one; that when he got to the hospital, he inquired for the president of the corporation asking the operator who told him she wasn't in; that he then asked if there was anybody else in authority there; that he did not ask who the president was and did not ask where the president might be found; that he saw the superintendent of the hospital and spoke to her.

If it is the duty of a deputy sheriff, under circumstances such as these, to search for the president or other officers of a corporation before making service upon other persons enumerated in the statute, it must be conceded that no such attempt

Further, the vice president, testified that the meetings of the directors were usually held at his office and not at the hospital. The testimony of Mrs. Karp shows that she was at her home at Chicago, Illinois, on the day the summons was served, and that she remained in Chicago continuously thereafter until January 18, 1919; that it was her custom to leave Chicago every Friday and to go to her country home and return to Chicago on the following Monday; that she was in Chicago continuously, except for these week-end visits throughout the summer; that June 11, 1918, was on Tuesday, and that on Wednesday, June 12, she presided at a board meeting of plaintiff corporation.

The evidence of the secretary, treasurer and vice-president of the plaintiff corporation is also to the effect that they were in Cook County at their respective homes, or offices, on June 14, 1918. The secretary remained in Chicago throughout the summer.

The deputy sheriff, Janssen, was called as witness for complainant and testified that he served the summons at the hospital of the complainant corporation on June 14, some time between a quarter of six and six o'clock; that he served other writs before he got to the hospital; that he left his office about a quarter past five, or thereabouts, and served two or three others before he served this one; that when he got to the hospital, he inquired for the president of the corporation asking the operator who told him she wasn't in; that he then asked if there was anybody else in an office there; that he did not ask who the president was and did not ask where the president might be found; that he saw the superintendent of the hospital and spoke to her.

It is the duty of a deputy sheriff, under circumstances such as these, to search for the president or other officers of a corporation before making service upon other persons enumerated in the statute, it must be conceded that no such attempt

was made by the deputy sheriff in this case.

We do not construe the statute to require such diligence. We think it could not have been the intention of the legislature to impose any such duty. If it was the duty of the sheriff to make a search for the president, how far would it be necessary for him to search, and for how long? Would it be necessary to search through the entire county and in all the usual places in which the president might be found? The rule for which complainant contends, in view of actual conditions in Cook County, would make the service of process on corporations in this county almost impossible.

We think the statute must be construed as directory rather than mandatory, and that the search in such case to be made by the sheriff for an officer of the corporation must be left entirely to his discretion. If the sheriff, in fact, found the president in the county, and notwithstanding this, served another, it might be that such service, if properly questioned by plea in abatement would be held invalid. But that situation is not disclosed here, it appearing without dispute that the president was not accessible at the place of business of the corporation.

Complainant cites Adams & Piggott Co. v. Allen, supra. That was a case where a corporation, having its office in Chicago, was sued outside the city and service had upon an agent of defendant, the return failing to state that the president was not found in his county. That case, as a matter of fact, turned upon the question of whether the bill alleged a meritorious defense. It was conceded that the return was subject to attack because it failed to state that the president was not found.

Cairo & Vin. R. R. Co. v. Joiner, 72 Ill. 520, it also cited by the complainant. The return there stated that the president did not reside in the county, but failed to state that he could not be found there. The complainant also relies on

was made by the deputy sheriff in this case.

We do not consider the state to require such diligence.

We think it could not have been the intention of the legislature

to impose any such duty. It is not the duty of the sheriff to make

a search for the president, nor for would it be necessary for him

to search, and for how long? Would it be necessary to search

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Complaint also states that the president was not found.

That was a case where a corporation, having its office in Chicago,

was sued outside the city and service had upon an agent of

defendant, the return failing to state that the president was

not found in his county. That case, as a matter of fact, turned

upon the question of whether the bill alleged a tortious

act. It was conceded that the return was subject to attack

because it failed to state that the president was not found.

State v. The Chicago & North Western Ry. Co., 12 Ill. 2d 500, 12

also cited by the defendant. The return there stated that the

president did not reside in the county, but failed to state that

he could not be found there. The complaint also failed to

St. L. A. T. & H. R. R. Co. v. Dorsey, 47 Ill. 288, a case arising under a former statute, which required the sheriff to show in his return that the president did not reside in the county or was absent from it. The return did not show those facts and was, therefore, held insufficient. We do not think any of these cases applicable.

Moreover, if we conceded this service in this respect insufficient, complainant had an adequate and complete remedy at law by way of entering its special appearance and filing a plea in abatement, setting up the defective service, and since it neglected that remedy it is, we think, not entitled to obtain that relief in a court of equity.

Complainant further contends that the return of the sheriff was false in that it stated that Frances Doody was the agent of the defendant corporation. It is urged, and rightly we think, that an agent of a corporation, within the meaning of section 8 of the Practice Act, must be one authorized to represent the corporation by its consent and, in some capacity, authorized by its charter. It would seem in justice that the agent upon whom process might be served should be one whose duty to the corporation would be such as would require him to report such service to his superiors. Apparently, agency for the purpose of the service of process cannot be created by estoppel. Equitable Produce & Stock Exchange v. Keys, 67 Ill. App. 460, and Barnard v. S. & W. E. Traction Co., 274 Ill. 143.

It is alleged in the bill, and admitted in the answer, that at the time the summons in question was served Frances Doody was the night supervisor of the nurses at the hospital conducted by the complainant, which was the only place at which it conducted business. The deputy sheriff who served the summons testified that Frances Doody was at the hospital in uniform, and that she was pointed out to him by the telephone operator as the

night superintendent.

Evidence which did not convince the chancellor, and which does not convince us, was given by Frances Deedy and others, tending to show a limitation upon her authority at the hospital to that of seeing that nurses carried out directions given by the physicians having patients there.

The superintendent was Miss Hinzle. She was present when the deputy sheriff appeared at the hospital to serve the summons, and he attempted to secure service on her. She adroitly excused herself for a few minutes and failed to return as she promised to do, thus avoiding service. Next morning when Miss Deedy handed a copy of the summons which had been served upon her to Miss Hinzle, Miss Deedy was upbraided by Miss Hinzle for permitting the service to be made, and Miss Hinzle, superintendent, took the copy of the summons and tore it up.

There is evidence tending to show that she gave the information which in the former proceedings led to an untrue averment in complainant's pleadings that the fact of service upon Miss Deedy had never been communicated to the superintendent of the hospital. Miss Hinzle was not produced as a witness, and her absence is not accounted for in any satisfactory way.

The complainant gives evidence, which if accepted, would lead to the conclusion that Miss Hinzle was responsible for the management of the hospital, both day and night, but the reasonable inference from all the evidence is that Miss Hinzle had general charge during the day and Miss Deedy at night.

It requires satisfactory evidence, and usually more than one witness, to overcome the return made by the sheriff in a case of this kind. Marnik v. Cusack, 317 Ill. 362; Rivard v. Gardner, 39 Ill. 125. See also Cairo & St. Louis Ry. Co. v. Holbrook, 92 Ill. 297.

Miss Deedy was employed by the complainant and her

night supervision.

Evidence which did not convince the specialist, and which does not convince us, was given by Frances Beedy and others, tending to show a limitation upon her authority at the hospital to that of seeing that nurses carried out directions given by the physicians having patients there.

The superintendent was Miss Hinkle. She was present

when the deputy sheriff appeared at the hospital to serve the warrant, and he attempted to secure service on her. She actually examined herself for a few minutes and failed to return on the promised to do, then avoiding service. Next morning when her Beedy handed a copy of the summons which had been served upon her to Miss Hinkle, Miss Beedy was apprised by Miss Hinkle for permitting the service to be made, and Miss Hinkle, superintendent, took the copy of the summons and tore it up.

There is evidence tending to show that she gave the

instruction which in the former proceedings led to an untrue statement in complainant's pleading that the fact of service upon Miss Beedy had never been communicated to the superintendent of the hospital. Miss Hinkle was not present in a witness, and the evidence is not accounted for in any satisfactory way.

The complainant gives evidence, which if accepted, would lead to the conclusion that Miss Hinkle was responsible for the management of the hospital, both day and night, but the testimony taken from all the evidence is that Miss Hinkle had General charge during the day and Miss Beedy at night.

If further satisfactory evidence, and usually more than one witness, to overcome the return made by the sheriff in a case of this kind. Hinkle v. Hinkle, 217 Ill. 322; Hinkle v. Hinkle, 217 Ill. 322. See also Hinkle v. Hinkle, 217 Ill. 322.

Hinkle v. Hinkle, 217 Ill. 322.

Miss Beedy was employed by the complainant and her

salary of \$150 per month was paid by complainant. We have no doubt that her duties were such as to include that of reporting the service of summons to her superiors. This the evidence shows she did. If complainant then desired to raise the question that Miss Loody's relation to the hospital was such that she could not be properly served as its agent, it could have done so by entering a special appearance and filing a plea in abatement, and this would secure its rights in that respect. Having a full and complete remedy at law of which it failed to avail itself, it is now precluded from obtaining the same relief in a court of equity.

Charitable corporations, whatever their privileges, are not exempted when suit is brought from the necessity of presenting any defense which they may have to the proper forum. They are not entirely above the law.

We have not thus far discussed the question of whether the subjection of the property of complainant to the satisfaction of this judgment should not be permitted because the same is held in trust. We think the solution of that question would necessarily depend upon the nature of the trust. Some of the property of the complainant may be held upon trusts of such nature as would preclude the satisfaction of the judgment therefrom. We do not think that question is before us. We do hold that defendant is entitled to the benefit of her judgment, and that complainant is not entitled to have it set aside or its collection permanently enjoined. Even though all the property which complainant at present holds should be held not subject to execution, it would not follow that it might not at some time come into the possession of property out of which the judgment of defendant would properly be satisfied.

The decree is therefore affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

...of this month was paid by complainant. We have no doubt
that her father was much as to include that of reporting the same
also of summing to her expenses. This the evidence shows she did.
If complainant then desired to raise the question that Miss Needy's
relation to the hospital was such that she could not be properly
served as its agent, it could have done so by entering a special
appearance and filing a plea in abatement, and this would secure its
rights in that respect. Having a full and complete remedy at law of
which it failed to avail itself, it is now precluded from obtaining
the same relief in a court of equity.
...Christian Corporation, whatever their privileges, are not
precluded when suit is brought from the necessity of presenting any
defense which they may have to the proper forum. They are not
...above the law.
We have not time for a discussion of the question of whether the
objection of the property of complainant to the action of
this judgment should not be permitted because the time is held in
trust. We think the solution of that question would necessarily
depend upon the nature of the trust. Some of the property of the
complaint may be held upon trusts of such nature as would preclude
the solution of the judgment therefrom. We do not think that
question is before us. We do hold that defendant is entitled to the
benefit of her judgment, and that complainant is not entitled to
have it set aside or the collection permanently enjoined. Even
though all the property which complainant at present holds should be
held not subject to execution, it would not follow that it might not
at some time come into the possession of property out of which the
payment of defendant would properly be satisfied.
The decree is therefore affirmed.

S. WARD-HAMILTON COMPANY,
A corporation, Appellant,

vs.

HIBBARD SPENCER BARTLETT COMPANY,
a corporation, Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

241 I.A. 616

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Upon the filing of a bill in equity based on the theory of unfair competition in the sale of chicken coops, a preliminary injunction was obtained upon complainant's motion and without notice to the defendant.

The defendant appeared and filed an answer, which was sworn to, and made a motion to dissolve the injunction, which was granted.

Defendant then filed suggestions of damages, including solicitors' fees and the cost of certain photographs which was incurred in connection with its motion to dissolve.

The court, after hearing the evidence, assessed the damages at \$1068.50, and complainant by this appeal seeks to reverse the order.

Upon the hearing solicitor for complainant testified in detail to the services performed by him, stating that from the 18th of February, 1925, until the 25th of February thereafter, he spent practically all his time on the matter, and that the sum of \$1,000 was a reasonable charge for the legal services rendered in that connection. He was corroborated as to the reasonableness of the charge by another competent witness.

The solicitor for the defendant testified that in his judgment a fee of \$200 to \$250 would be a fair and reasonable

APPEAR FROM COUNCIL COURT
ON COOK COUNTY.

241 I.A. 616

H. B. HAMILTON COMPANY,
A corporation,
Appellant,
vs.
H. B. HAMILTON COMPANY,
A corporation,
Appellee.

MR. FRANKLIN J. WHITE, COUNSEL
ADVISED THE COURT.

Upon the filing of a bill in equity based on the theory of unfair competition in the sale of chicken coops, a preliminary injunction was obtained upon complainant's motion and without notice to the defendant.

The defendant appeared and filed an answer, which was sworn to, and made a motion to dissolve the injunction, which was granted.

Defendant then filed suggestions of damages, including solicitors' fees and the cost of certain photographs which was incurred in connection with its motion to dissolve.

The court, after hearing the evidence, assessed the damages at \$1000.00, and complainant by this appeal seeks to reverse the order.

Upon the hearing solicitor for complainant testified in detail to the services performed by him, stating that from the 15th of February, 1928, until the 25th of February thereafter, he spent practically all his time on the matter, and that the sum of \$1,000 was a reasonable charge for the legal services rendered in that connection. He was corroborated as to the reasonableness of the charge by another competent witness.

The solicitor for the defendant testified that in his judgment a fee of \$200 to \$250 would be a fair and reasonable

charge, and he was also corroborated by a witness.

The chancellor expressly found that the temporary injunction was wrongfully issued, and that the fair and reasonable charge for the legal services necessarily rendered by defendant's solicitors in procuring dissolution of the temporary injunction, was \$1,000, and that defendant made a necessary expenditure of \$68.50 for the costs of the exhibits referred to in the suggestion of damages.

The bill of complaint and the answer have not been abstracted, but complainant states in his brief, "The law on this subject could be found in an hour or two by an intelligent law clerk." However, in affidavits made by solicitors for the complainant, asking for extension of time in connection with abstracts and briefs, the solicitors have stated, "The record is a voluminous one requiring the study of much detail."

In a matter of this kind the amount of solicitors' fees would depend largely on the amount involved in the litigation and the importance of the question to be decided, as well as the amount of actual services performed.

In the absence of an abstract of either bill or answer, this court is not able to say that the finding of the chancellor, who heard the evidence and considered both bill and answer, is manifestly incorrect and the order will therefore be affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

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change, and he was also corroborated by a witness.

The chancellor expressly found that the temporary

information was wrongfully issued, and that the fair and reasonable

charge for the legal services necessary rendered by defendant's

solicitors in procuring dissolution of the temporary information

was \$1,000, and that defendant made a necessary expenditure of

\$68.50 for the costs of the exhibits returned to in the suggestion

of damages.

The bill of complaint and the answer have not been

abstracted, but complaint states in the brief, "The law on this

subject could be found in an hour or two by an intelligent law

student." However, in affidavits made by solicitors for the complain-

ant, asking for extension of time in connection with abstracts and

briefs, the solicitors have stated, "The record is a voluminous one

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In a matter of this kind the amount of solicitors'

fees would depend largely on the amount involved in the litigation

and the importance of the question to be decided, as well as the

amount of actual services performed.

In the absence of an abstract of either bill or

answer, this court is not able to say that the finding of the

chancellor, who heard the evidence and considered both bill and

answer, is manifestly incorrect and the order will therefore be

affirmed.

APPROVED.

Testimony and exhibits, etc., etc.

JOY MORTON,

Appellee,

v.

CENTRAL PRESS PRINTING CO.,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

241 I.A. 616

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant below seeks to reverse an order entered by the trial court denying the motion of defendant to vacate a judgment theretofore entered by confession against defendant and in favor of plaintiff under power granted by the terms of a written lease.

The judgment in question was entered June 11, 1925, and, including attorneys' fees, was for the total sum of \$935.

The defendant, appellant, in support of his motion to vacate the judgment, filed an affidavit in which he set up that he had knowledge of the facts and believed the defendant had a good and meritorious defense to the whole of the plaintiff's demand; that the lease upon which judgment was entered contained provisions to the effect that in case of injury by fire of the demised premises, or any part thereof, the lessor should have sixty days in which to repair and restore the same without terminating the lease; that if during the life of the lease the premises should be so injured by fire as to be untenable, then unless said injury be repaired within sixty days thereafter, as theretofore specified, either party thereto, upon written notice to the other party given not later than seventy days after the fire might terminate the lease in which case rent should be apportioned and paid to the date of such fire.

JOY HORTON,
Appellee,

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

241 I.A. 616

CENTRAL TRUSTS TRUSTING CO.,
Appellant.

MR. FREDERICK JUSTICE MAYMENT
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse

an order entered by the trial court granting the motion of
defendant to vacate a judgment theretofore entered by conviction
against defendant and in favor of plaintiff's order power granted
by the terms of a written lease.

The judgment in question was entered June 11, 1935.

and, including attorney's fees, was for the total sum of \$235.

The defendant, appellant, in support of his motion to

vacate the judgment, filed an affidavit in which he set up that

he had knowledge of the facts and believed the defendant had a

good and sufficient defense to the whole of the plaintiff's

demand; that the issues upon which judgment was entered contained

provisions to the effect that in case of injury by fire of the

leased premises, or any part thereof, the lessee should have

every year in which he would not receive the same amount

received the year; that it further was one of the issues

the premises should be so insured as to be so insurable;

and which was being so insured at the time the judgment

was rendered. That the defendant, appellant, was not aware

of the facts given and later than seven days after the

time might terminate the issue in which case it should be

operational and held on the date of such time.

The affidavit further alleged that said premises were so injured by fire as to be untenable on March 11th and 12th, A. D. 1923, and that by reason thereof the said defendant, the Central Press Printing Co., was obliged to and did remove its printing establishment and office therefrom, that immediately following said fire defendant requested plaintiff to restore the premises within sixty days after said fire to the same condition as the premises were prior thereto, but the plaintiff neglected and failed to repair and restore the same, and that thereafter and within seventy days after said fire, the defendant gave to the plaintiff and his agents, Ross & Company, written notice of the termination of said lease, as provided therein and offered to pay such amount as might be due under the terms of said lease up to the date of said fire; that the notice so given was sent by United States mail postpaid in an envelope addressed to the said Joy Morton and Ross & Company, at the office of Ross & Company, agents of the plaintiff and the affidavit sets up said notice.

It is further averred that defendant was not indebted to the plaintiff in the sum of \$935, or any other sum beyond the amount that may be due under said lease for the period from the first day of March, A. D. 1923, to the date of said fire, being the 11th day of March, A. D. 1923, which sum defendant was willing and offered to pay to the plaintiff whenever and in such manner as the court might direct, that the motion to vacate said judgment and for leave to plead and defend said suit was not made for delay but that justice might be done.

The law applicable to motions of this kind has been so often stated that it would seem to be unnecessary to restate the same. The affidavit in support of such a motion is construed most strongly against the pleader. Chicago Fire Proof Co. et al. v. Park National Bank, 145 Ill. 481.

The plaintiff further alleged that said premises were so injured by fire as to be untenable on March 11th and 12th, A. D. 1935, and that by reason thereof the said defendant, the Central Press Printing Co., was obliged to and did remove the printing establishment and office therefrom; that immediately following said fire defendant requested plaintiff to restore the premises within sixty days after said fire to the same condition as the premises were prior thereto; but the plaintiff neglected and failed to repair and restore the same, and that thereafter and within seventy days after said fire, the defendant gave to the plaintiff and his agents, Ross & Company, written notice of the termination of said lease, as provided therein and offered to pay such amount as might be due under the terms of said lease up to the date of said fire; that the notice so given was sent by United States mail postpaid in an envelope addressed to the said Roy Horton and Ross & Company, at the office of Ross & Company, agents of the plaintiff and the plaintiff took up said notice. It is further averred that defendant was not indebted to the plaintiff in the sum of \$998.00, or any other sum beyond the amount that may be due under said lease for the period from the first day of March, A. D. 1935, to the date of said fire, being the 11th day of March, A. D. 1935, which sum defendant was willing and offered to pay to the plaintiff whenever and in such manner as the court might direct. That the motion to vacate said judgment and for leave to plead and defend said suit was not made for delay but that justice might be done. The law applicable to motions of this kind has been so often stated that it would seem to be unnecessary to recite the same. The plaintiff is alleged to have a motion in pending suit against the plaintiff. Central Press Printing Co., Inc. v. Bank National Bank, Ltd. 1935.

If the affidavit shows a good defense and that the defendant was not negligent, the court in exercise of a sound discretion should set aside the judgment and allow the case to be tried upon the merits. Malinsday v. Underwood, 75 Ill. App. 96; Gettinger v. Levit, 186 Ill. App. 105.

We think the affidavit here set up such defense on the merits.

The plaintiff contends that the notice, as set up in one of the affidavits, which was filed by defendant in support of its motion, was insufficient in that it was addressed to "Joe Morton" instead of Joy Morton; that it bears no date and that there are no allegations indicating that the same was ever served.

In support of this contention, plaintiff cites a number of cases in which the court was considering whether the evidence in these particular cases was sufficient to show service as required under the particular agreements between the parties.

Here the question is not one of evidence, but one of a proper pleading. It is elementary that it is unnecessary to plead the evidence. The pleading should state ultimate facts. This affidavit does state that the defendant "then and within seventy days after said fire notified plaintiff of its intention to cancel said lease." We think the allegation was sufficient. It will be time enough to weigh the evidence when it is before us.

The plaintiff also contends that the affidavit was insufficient in that it failed to allege that defendant paid or tendered to the plaintiff the rent due to the date of the fire. On this point, the defendant cites a number of cases in which the court was considering the cancellation of insurance policies, and where it was held that before a policy can be cancelled upon notice, it is incumbent upon the insurance company to pay or tender to the policy holder the unearned

If the affidavit shows a good defense and that the defendant was not negligent, the court in exercise of its sound discretion should set aside the judgment and allow the case to be tried upon the merits. Maloney v. Underwood, 70 Ill. App. 3d; Decker v. Davis, 100 Ill. App. 103.

We think the affidavit here set up such defense as

the merits.

The plaintiff contends that the motion, so set up in one of the affidavits, which was filed by defendant in support of its motion, was insufficient in that it was addressed to "Joe Weston" instead of "My Motion"; that it bears no date and that there are no allegations indicating that the same was ever served.

In support of this contention, plaintiff cites a number of cases in which the court was considering whether the evidence in these particular cases was sufficient to show service as required under the partition agreements between the parties. Here the question is not one of evidence, but one of proper pleading. It is elementary that it is unnecessary to plead the evidence. The pleading should state what facts. This affidavit does state that the defendant "then and there" never says after said like verified plaintiff of the intention to cancel said lease. We think the allegation was sufficient. It will be time enough to weigh the evidence when it is before us.

The plaintiff also contends that the affidavit was insufficient in that it failed to allege that defendant paid or tendered to the plaintiff the rent due on the date of the filing. On this point, the defendant cited a number of cases in which the court was considering the sufficiency of affidavits, and where it was held that failure to allege that defendant cancelled upon notice, it is immaterial upon the issue of company to pay or tender to the plaintiff the amount

premium. The distinction between a contract of insurance and of a lease is marked, and hardly calls for discussion.

We do not regard the cases cited as at all applicable to the situation presented by the record.

We think the affidavit of defendant set up a good defense, and that the court in the exercise of its discretion should have set aside the judgment confessed and permitted a trial upon the merits.

For its failure to do so the order is reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

IDA E. COYE, Executrix of
the Estate of Charles A. Coye,
Appellee,

vs.

H. T. WHITE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 616

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Charles A. Coye in his lifetime brought a suit in assumpsit as the alleged assignee before maturity of a promissory note made by defendant on February 26, 1921, whereby defendant promised to pay to the order of Harry E. Labour the sum of \$9600 on February 25, 1922. Pending the suit plaintiff died, and Ida E. Coye, as executrix of his estate, was substituted as plaintiff.

The defendant, White, filed certain amended pleas which set forth in detail that the note was obtained through the reliance of defendant upon false statements of Labour by which defendant was damaged to an amount in excess of the amount of the note, the pleas setting up substantially the defenses of want and failure of consideration, with a denial that the Estate of Charles A. Coye was an innocent holder of the note for value before maturity or in fact the owner of it at all.

Replications were filed to these pleas, the cause submitted to a jury, and at the close of all the evidence, upon motion of plaintiff's attorney, the court instructed the jury to find the issues for the plaintiff, whereupon a verdict was returned so finding the issues and assessing plaintiff's damages at the sum of \$11,629.46. Motions for a new trial and in arrest being over-ruled, the court entered judgment on the verdict and this appeal followed.

THE STATE OF TEXAS,
COUNTY OF DALLAS,
vs.
CHARLES A. GAY,
Appellant.

241 I.A. 616

MR. THOMAS J. MURPHY, ATTORNEY AT LAW,
FURNISHES THE OPINION OF THE COURT.

Charles A. Gay in his lifetime procured a suit in
assault and battery against the defendant, a promissory
note made by defendant on February 28, 1921, whereby defendant
promised to pay to the order of Harry E. Leland the sum of \$2500
on February 28, 1922. Following the suit plaintiff filed, and the
Gay, as executor of his estate, was substituted as plaintiff.
The defendant, wife, filed certain amended pleadings
which set forth in detail that the note was obtained through the
fraudulent representations of defendant upon false statements of Leland by which the
Leland was damaged to an amount in excess of the amount of the
note. The plaintiff setting up substantially the balance of want
and failure of consideration, with a denial that the State of
Texas was an innocent holder of the note for value.
Charles A. Gay was an innocent holder of the note at all
times before maturity or in fact the owner of it at all.
Repleaders were filed to these issues, the issues
submitted to a jury, and at the close of all the evidence, upon
motion of plaintiff's attorney, the court instructed the jury to
find the issues for the plaintiff, between a verdict was re-
turned so finding the issues and assessing plaintiff's damages at
the sum of \$1,000.00. Motion for a new trial and in arrest being
overruled, the court entered judgment on the verdict and this
appeal followed.

On the trial the plaintiff called as a witness a daughter of Charles A. Coye, deceased, who identified the endorsements on the back of the note as those of Charles A. Coye and the payee, Harry W. Labour. She further testified that the note was put through the bank at Grand Rapids on January 11, 1922, and bears the stamp of the Old National Bank, which was the bank in which her father did business. The note was introduced in evidence.

The witness further testified that her father died on February 27, 1924. A certified copy of the letters of administration issued by the Probate court of the County of Kent, Michigan, appointing Ida M. Coye executrix of the last will and testament of Charles A. Coye, deceased, was also received in evidence, and the plaintiff rested. Thereupon the defendant was produced as a witness in his own behalf and testified that he resided in Evanston, and his counsel, objection being made to his testimony, admitted that he was the defendant in the suit.

The matter having been argued at length out of the presence of the jury, the jury was brought in. Thereupon the following colloquy occurred between the counsel and the court:

"The Court: All right, bring on the jury; prepare a form of verdict directing the jury.

Mr. Stebbins: Well, if your Honor please, it necessitates, I think, of making a record, by making my offer of proof?

The Court: Yes. Now you may make your proof, Mr. Stebbins, what you offer to prove by the witness White."

Thereupon the attorney for the defendant offered to prove by the defendant as a witness that certain facts and transactions occurred between the defendant and the payee of the note sued on, stating that there were no other witnesses to the transaction except White and Labour; that Labour was adverse and denied the false representations which defendant now offered to prove, and that there was no witness by whom the false representations could be proved except by R. T. White.

On the trial the plaintiff called as a witness a daughter of Charles A. Goye, deceased, who identified the marks on the back of the note as those of Charles A. Goye and the payee, Harry W. Labovay. The further testified that the note was put through the bank at Grand Rapids on January 11, 1932, and bears the stamp of the Old National Bank, which was the bank in which her father did business. The note was introduced in evidence. The witness further testified that her father died on February 27, 1931. A certified copy of the letters of administration issued by the probate court of the County of Kent, Michigan, appointing Isaac Goye executor of the last will and testament of Charles A. Goye, deceased, was also received in evidence, and the plaintiff rested. Thereupon the defendant was produced as a witness in his own behalf and testified that he resided in Keweenaw, and his counsel, objection being made to his testimony, admitted that he was the defendant in the suit. The matter having been argued at length out of the presence of the jury, the jury was brought in. Thereupon the following colloquy occurred between the counsel and the court: "The Court: All right, bring on the jury; prepare a form of verdict directing the jury." "Mr. Becklund: Well, if your Honor please, it is unnecessary, I think, of making a record, by making my offer of proof." "The Court: Yes. Now you may make your proof, Mr. Becklund. And you offer to prove by the witness White." Thereupon the attorney for the defendant offered to prove by the defendant as a witness that certain facts and transactions occurred between the defendant and the payee of the note sued on, stating that there were no other witnesses to the transaction except White and Labovay; that Labovay was adverse and denied the facts represented which defendant now offered to prove, and that there was no witness to whom the facts represented could be proved except by White.

Further, defendant offered to prove by the witness that Goye was not present at any of the transactions, and further to prove by the sworn statement of Charles A. Goye, made in his lifetime, that he did not claim to have acquired any interest in the note until October, 1921, and further to prove by the sworn statement of Charles A. Goye in his lifetime that he was not an innocent holder for value before due of the note.

Then, returning to matters which defendant offered to prove by his own testimony with reference to the alleged false and fraudulent representations concerning the consideration for the execution of the note, attorney for defendant offered to prove these matters in detail, as set up in the amended pleas, and further offered to prove by written documents that certain patents, which it was alleged had been represented by LaBour to have been assigned to the Chemical Equipment Company, had not been in fact assigned. Whereupon the following colloquy occurred:

"Mr. Dawson: Now pardon me, counsel. If the Court please, he is offering to prove certain things by certified copies and he doesn't offer them, doesn't produce them here. I don't know just how the record is going to look that way.

"Mr. Stebbins: I take it that in making a convenient record in the speediest time possible, I will prove all these other things. The Court can rule on the offer of White that this patent was issued on certain features of the packing gland."

Thereupon, counsel for defendant further stated that he offered to prove the issuance of the patent by a certified copy of it and by the testimony of the defendant that the patent had never in fact been assigned to the Chemical Equipment Company, nor had any application for it been so assigned at the time of the execution of the note.

The defendant further offered to prove that the stock in the Chemical Equipment Company, which had been given as a consideration for the note, had been tendered to LaBour and refused

Further, defendant offered to prove by the witness that
Goye was not present at any of the transactions, and further to
prove by the sworn statement of Charles A. Goye, made in his life-
time, that he did not claim to have acquired any interest in the
note until October, 1931, and further to prove by the sworn state-
ment of Charles A. Goye in his lifetime that he was not an innocent
holder for value before due of the note.
Then, returning to matters which defendant offered to
prove by his own testimony with reference to the alleged time and
transmission of representations concerning the consideration for the
execution of the note, attorney for defendant offered to prove those
matters in detail, as set up in the amended pleadings, and further al-
luded to prove by written documents that certain statements, which
it was alleged had been represented by defendant to have been assigned
to the Chemical Equipment Company, had not been in fact assigned.
Whereupon the following colloquy occurred:
"Q. Now, defendant, how would you account for the fact that
it is alleged to have certain things by certified copies and
to have been assigned to the Chemical Equipment Company? I don't know
just how the record is going to look that way.
"A. Well, I think it is making a convenient
record of the specified time possible, I will prove all those
things. The Court can rule on the other of White that
this record was made on certain features of the bookkeeping
system."
Thereupon, counsel for defendant further stated that he
desired to prove the issuance of the notes by a certified copy of
it and by the testimony of the defendant that the papers had never
in fact been assigned to the Chemical Equipment Company, nor had any
application for it been so assigned at the time of the execution of
the note.
The defendant further offered to prove that the note
in fact was assigned to the Chemical Equipment Company, which fact defendant
alleged was the fact, and that defendant to defendant was assigned

the stock to Harry E. LaFour; do you insist on my getting it out and making proof?"

"Mr. Dawson: I want to have the record show this.

"The court: A tender of the stock would not be something that could be necessary to prove by this witness, would it?"

"Mr. Dawson: By this witness?"

"Mr. Stebbins: No, but my theory about this tender is that to make a tender is to offer something that they have to prove by Mr. White, and also other things; otherwise we would have to go through the formality of introducing all this proof; then the court can say, inasmuch as I cannot prove one material element of my case, therefore, the court does so and so; that was my theory of this tender.

"Mr. Dawson: I think they are going to mix it up, your honor. I want to expedite matters. He has offered some proof of what some other witness, that isn't here, might say.

"The Court: The record will show that he offered it on the grounds that it not of itself may be competent, but it is not competent to--

"Mr. Stebbins: I didn't have in mind that the court would do that. I had in mind the court would say that inasmuch as the tender embodies an indispensable element of the case I can prove it only by White, therefore, rather than submit it to the jury.

"The Court: All right, go ahead.

"Mr. Stebbins: I want the court to do whatever is right on the thing.

"Mr. Dawson: If I may say this, my idea of this was, that inasmuch as this witness couldn't testify, Mr. Stebbins said he couldn't make out the case without that witness.

"Mr. Stebbins: I am going to conclude my offer of proof by an admission of that fact.

"The Court: All right, go ahead."

Whereupon, again the attorney for defendant stated that he offered to prove by witnesses not interested in the case, other than the defendant, that defendant had tendered on or about July 29, 1922, to Charles A. Coye ninety-six shares of the capital stock of the Chemical Equipment Company, and that this tender had been refused; that this tender had been repeated to counsel by the executrix, stating, "in short we offer to prove every allegation in the third amended pleas by witnesses not parties to the suit, and not interested in the suit, or by documentary evidence, the introduction of which does not require oral testimony, or by the sworn

the stock to Harry E. Labaree; so you insist on my getting it out

and making good?"

"Mr. Dawson: I want to have the record show this. A tender of the stock would not be something that could be necessary to prove by this witness."

"Would it?"

"Mr. Dawson: By this witness?"

"Mr. Stoddard: No, but my theory about this tender is that to make a tender is to offer something that they have to prove by Mr. White, and also when the possibility of introducing all this proof; then the court can say, inasmuch as I cannot prove one material element of my case, therefore, the court does so and so; that was my theory of this tender. I think they are going to mix it up, your Honor. I want to expedite matters. He has offered some proof of what some other witness, that isn't here, might say."

"The Court: The record will show that he offered it on the grounds that it is not of itself may be competent, but it is not competent to--"

"Mr. Stoddard: I don't have in mind that the court would be that. I had in mind the court would say that inasmuch as the tender embodied an inadmissible element of the case I can prove it only by White, therefore, your Honor submit it to the jury."

"The Court: All right, so be it. I want the court to do whatever is right on the thing."

"Mr. Dawson: If I may say this, my idea of this was, that inasmuch as this witness couldn't testify, Mr. Stoddard will be called to make out the case with that witness."

"The Court: I am going to appoint my officer of record by an action of law."

"The Court: All right, as usual."

he offered to prove by witnesses not interested in the case, other than the defendant, that defendant had tendered on or about July 30, 1932, to Charles A. Coye ninety-six shares of the capital stock of the Chemical Equipment Company, and that this tender had been returned; that this tender had been rejected is asserted by the

executive, stating, "in short we offer to prove every allegation in the third amended plea by witnesses not parties to the suit, and not interested in the suit, or by documentary evidence, the introduction of which does not require oral testimony, or by the sworn

statement of Charles A. Coye in his lifetime, all the allegations in the third amended pleas, except that we cannot prove, by any witness, except the defendant, W. F. White, the representations made to him by Harry E. LaTour constituting the consideration for the execution of the note, the falsity of those representations; that he relied upon those representations; that he believed them to be true; that he ^{was} deceived thereby and that he was injured thereby to an amount in excess of the amount of the note, and that he didn't discover the fraud until on or about the time the note was due, and that he then elected to rescind this transaction; those things we can only prove by Mr. White."

"The Court: You offer now, Mr. White as a witness to prove those things?"

"Mr. Stebbins: Yes."

"The Court: Which proof, on those things stated, and the facts and circumstances as stated in your exceptions you offer to be proven by Mr. White, the defendant in this case?"

"Mr. Stebbins: In short, we admit in open court that the fraud can only be proven by Mr. White."

"The Court: And you are offering him as a witness to prove that?"

"Mr. Stebbins: We are offering him as a witness to prove these things."

"The Court: To which you object?"

"Mr. Dawson: Yes."

"The Court: On the ground that he is excluded under the Evidence Act as a competent witness?"

"Mr. Dawson: Yes."

"The Court: That objection is sustained."

"Mr. Stebbins: Exception."

Whereupon the counsel for defendant stated in substance that anticipating the ruling ^{of} court a bill in chancery had been filed to enjoin the further prosecution of the suit, and that notice had been served to appear before the Chancellor next morning at nine o'clock, and thereupon asked leave to withdraw a juror, and that the case be postponed for a reasonable time and re-assigned.

Objection to this was made on behalf of the plaintiff, whereupon the court stated that, in view of these circum-

statement of Charles A. Gwyn in his lifetime. All the allegations in the third amended plea, except that we cannot prove, by any witness, except the defendant, E. M. White, the representations made to him by Henry M. Johnson constituting the consideration for the execution of the note, the falsity of those representations; that he relied upon those representations and that he believed them to be true; that he executed thereby and that he was induced thereby to an amount in excess of the amount of the note, and that he didn't discover the fraud until an or about the time the note was due, and that he then elected to rescind this transaction.

THE COURT: Yes, after you, Mr. White as a witness to prove the identity of the defendant.

...to be proven by Mr. White, the defendant in ... circumstances as stated in your examination ... the Court: ... on these things stated, and the facts ...

and said there were no plans to move at this time.

10-10-68

...the following information is being furnished to you:

1945

Witnesses are to be excluded under the

1977, December 15. The report stated that, in view of the fact that the report was made on the basis of the information received from the informant, it was not possible to determine the exact date of the meeting. It was, however, stated that the meeting took place in the latter part of 1977.

stances he would direct a verdict and let it be returned, but would not enter judgment on the verdict for at least a period of ten days, and in view of that understanding would direct a verdict, which was accordingly done.

The controlling question in the case, as we view it, is whether the defendant under the circumstances which appear in the record, was a competent witness to testify to the matters and things which were offered to be proved by him. In this court, however, the defendant has raised a preliminary question, and has argued quite at length that it was error for the court to instruct the jury to return a verdict in view of the offer made by defendant to prove by evidence other than that of defendant that plaintiff was not in fact the owner of the note at all.

No witness was produced or sworn by whom it is claimed such fact could have been proved, and no documentary or other evidence was offered tending to establish that fact. No question was directed to any witness upon that issue, and in view of the admission made by the attorney for the defendant that he could not make out the case without the defendant's testimony, we think he is precluded from making that contention here. There are cases which hold (and defendant has cited some of these in his reply brief, namely, Scotland County v. Hill, 112 U. S. 183; 28 L. Ed. 692; and Bartholow v. Davies, 276 Ill. 505) that where a court intimates that it will reject any evidence offered tending to show a given fact on the ground that it is immaterial and improper, it will then be unnecessary for a party to produce the witness in court and ask the specific questions directed to the point.

The general rule, however, is that error cannot be assigned upon a mere colloquy between court and counsel. C. & C. Ry. Co. v. Carroll, 206 Ill. 318; Martin v. Hertz, 224 Ill. 84. The test would seem to be in every case the exercise of good faith on the

stipulation he would direct a verdict and that it be returned, but
would not enter judgment on the verdict for at least a period of
ten days, and in view of that understanding would direct a verdict,
which was accordingly done.

The controlling question in the case, as we view it,
is whether the defendant under the circumstances which appear in the
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No witness was produced or sworn by whom it is claimed
such fact could have been proved, and no testimony or other evi-
dence was offered tending to establish that fact. No question was
disputed to any witness upon that issue, and in view of the admis-
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out the case without the defendant's testimony, we think he is pro-
hibited from making that contention here. There are cases which
hold (and defendant has cited some of these in his reply brief,
namely, East and Lewis v. Hill, 113 U. S. 128; McA. 692;
and Bartholomew v. Taylor, 270 Ill. 628) that where a court intimates
that it will reject any evidence offered tending to show a given
fact on the ground that it is immaterial and irrelevant, it will then
be unnecessary for a party to produce the witness in court and ask
the specific questions directed to the point.

The general rule, however, is that error cannot be
sustained upon a mere colloquy between court and counsel. U. S. 22
Mc. Co. v. Carroll, 201 Ill. 415; Smith v. Smith, 201 Ill. 415.

part of both court and counsel, and we think it is perfectly apparent from this record that neither the court nor the counsel for the plaintiff understood that defendant took the position that he had made an offer of proof from which the court would be bound to find that there was evidence before it tending to show that the plaintiff was not in fact the owner of the note.

The controlling question in the case therefore involves a construction of Section 2 of the Evidence Act. It is as follows:

"No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: ---"

The defendant does not argue, as we understand him, that there are any facts in the record which bring the testimony offered in favor of the defendant within any one of the exceptions named in this statute, but argues with great earnestness that the section should be so construed as to make the evidence admissible. It is suggested that the Evidence Act should be construed according to its spirit and its purpose and not literally or technically, and this may be conceded.

The undoubted purpose of the Act was to remove some of the disqualifications of witnesses which existed at common law, and the first section of the Act does remove those disqualifications in language as plain and clear as that of the second section, which also definitely provides that the disqualification shall not be removed, where a party defends, as here, a suit brought by the executrix of the estate of a deceased person.

This statute is a re-enactment verbatim of a similar enactment of a statute of this state in 1867, and the suggestion

would put it in harmony with the express statutory provisions on the same subject in nearly every state of the Union, is hardly an argument which would be expected to appeal to a reviewing court.

If the legislature of Illinois desired that this statute should be thus put in harmony with the codes of other states, it would be for the legislature, rather than the reviewing court, to make the change which would bring about that harmony. We do not understand that the construction of a statute according to its spirit and its purpose gives the reviewing court the license to disregard the plain, obvious meaning of the words and sentences of the statute.

On the contrary, the controlling question in the construction of the statute is to find the legislative intention, but the court in finding it is limited to the words used by the legislature. Moreover, while it is clear that the purpose of Section 1 of the Evidence Act is to emancipate witnesses from restrictions which theretofore existed, it is just as plain that the obvious purpose of Section 2 is to place definite limitations upon that restriction.

Certain it is that if any such construction as that which defendant insists can be placed upon this Act, it has not in all the years in which the statute has been upon the books been so construed by any court of this state. The defendant cites Hitz v. Squadder Syrup Company, 199 Ill. App. 605, but that was a case where the right of a party in interest to testify was upheld under the express exception set forth in the statute, and the court so declared.

Upon the same ground in Van Meter v. Goldfarb, 317 Ill. 620, upon which defendant also relies, the Supreme Court held that where the real party in interest had given testimony as an occurrence witness in an action for wrongful death brought by the

would not be in harmony with the various statutory provisions on the same subject in nearly every state of the Union, is hardly an argument which would be expected to prevail in a reviewing court.

If the Legislature of Illinois desired that this

statute should be that not in harmony with the codes of other states, it would be for the Legislature, rather than the reviewing court, to make the change which would bring about that harmony.

We do not understand that the construction of a statute according to its spirit and its purpose gives the reviewing court the license to disregard the plain, obvious meaning of the words and sentences of the statute.

In the contrary, the construction of a statute is the construction of the statute as it is found in the legislative intention, and the court in finding it is limited to the words used by the Legislature. However, while it is clear that the purpose of Section 1 of the Statute Act is to exempt witnesses from restrictions which Statute 1891, it is just as plain that the obvious purpose of Section 2 is to place definite limitations upon that

restriction.

Certain it is that if any such construction as that which section 2 of Statute 1891 can be placed upon this Act, it has not in all the years in which the statute has been upon the books been so construed by any court at this state. The defendant cites People v. ...

People v. ..., 109 Ill. App. 600, but that was a case

where the right of a party in interest to testify was upheld under the common law and not under the statute, and the court so

decided.

That the court in People v. ..., 109 Ill. App. 600, was not authorized to do so, is plain from the fact that the court in that case was not authorized to do so, and the court so decided.

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administrator against the defendant, defendant might also testify to the transaction. That decision was in entire harmony with the statute. It would be manifestly unfair that one party in interest should be permitted to testify, while the other should be excluded.

The defendant further suggests that this section of the statute is susceptible of the construction that it is not to be applied where, as here, a person in his lifetime commences a suit and then dies pending the suit. Siegle v. Criss, 312 Ill. 317, is cited to this point, but does not sustain it. In that case, a suit was brought by two complainants against a defendant, and pending the suit, one of the plaintiffs died. The defendant was permitted to testify in the case, but as to what facts or under what circumstances the opinion of the court does not disclose. The court in its opinion states, "We think the testimony of Criss was competent under proper instruction as was given in the case by the court."

St. John v. Lofland, 5 N. D. 140, 64 N. W. 930, is cited and relied on. In that case the plaintiff, administratrix, brought an action to foreclose a mortgage, and the defense was that the mortgage had been in fact paid to a prior administratrix of the same estate, to whom it was first given. This administratrix having died, the plaintiff was afterwards appointed as administratrix of the estate in her place. The defendant upon the trial testified that he had paid the note and the mortgage to the former administratrix during her lifetime, and it was claimed that the evidence was incompetent under the provisions of the statute. It was held upon appeal that the evidence was competent. The court said that it was evident under the statute there construed that the testator or intestate referred to was one whose executor or administrator was a party to the suit and not any testators or

administration against the defendant, defendant might also testify to the transaction. That decision was in entire harmony with the statute. It would be manifestly unjust that one party in the transaction should be permitted to testify, while the other should be excluded.

The defendant further suggests that this section of the statute is unconstitutional of the constitution that it is not to be applied where, as here, a person in his lifetime commences a suit and then dies pending the suit. Wheeler v. O'Brien, 212 Ill. 617, is cited in this point, but does not sustain it. In that case, a suit was brought by two complainants against a defendant, and pending the suit, one of the plaintiffs died. The defendant was permitted to testify in the case, but as to what facts or matters which circumstances the opinion of the court does not disclose. The court in its opinion states, "We think the testimony of Criss was competent under proper instructions as was given in the case by the court."

St. John v. Holland, 81 Ill. 2d 1, 84 Ill. 2d 930, is cited and relied on. In that case the plaintiff, administrator, brought an action to foreclose a mortgage, and the defense was that the mortgage had been in fact paid to a proper administrator of the same estate, to whom it was first given. This administrator testified that the mortgage was foreclosed against the estate.

The defendant upon the trial testified that he had paid the note and the mortgage to the plaintiff administrator saying her lifetime, and it was claimed that the evidence was incompetent under the provisions of the statute. It was held that the evidence was competent. The court said that it was evident under the statute there concerned that the plaintiff in lifetime retained in the same manner as administrator was a party to the suit and was competent to

intestate with whom the transaction had been had or by whom the statement had been made. That to hold otherwise would require that the statute be broadened by interpretation on the theory that its true spirit demanded an extension of its literal meaning, and the court asked if such rule were to be followed where the matter of interpretation would end; whether a transaction with a deceased agent was within the statute, or whether where one of two partners had died and the survivor, who might occupy a position similar to that occupied by an administrator and sued on a partnership claim, the rule of disqualification would apply.

It is apparent that in that case the question was whether the provisions of the statute should be extended by construction. The question here is whether the statute shall be applied to a case, which by no sort of construction of the words used, can be taken outside of the terms of the statute. The defendant cites Wigmore on Evidence, vol. 1, sec. 570, which upon examination we find to be an interesting discussion as to whether this statute we are now called upon to consider and similar statutes should not be repealed - the author taking the affirmative view. It goes without saying that the views there expressed would more properly be presented to the legislature, which has power to change the law. We do not understand the author to argue in favor of the construction of this statute for which the defendant here contends.

The defendant, however, further suggests that if the court should be of the opinion that it cannot give to the section the construction which he seeks to put upon it, then he desires to raise the question that his constitutional rights are violated by this statute, and ask that under section 102 of the Practice Act

...the transaction had been had or by whom
the statement had been made. What to hold otherwise would
require that the statute be construed by interpretation on the
theory that the true spirit demanded an extension of its literal
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action with a deceased agent was within the statute, or whether
there one of two partners had died and the survivor, who might
occupy a position similar to that occupied by an administrator
and made on a partnership of law, the rule of disqualification
would apply.
It is apparent that in that case the question was
whether the provisions of the statute should be extended by con-
struction. The question here is whether the statute shall be
applied to a case, which by no sort of construction of the words
used, can be taken outside of the terms of the statute. The
statute itself is plain in its meaning, and it is not
the duty of the court to extend it beyond its literal
meaning. This statute is not an exception to the general rule
that statutes should not be repealed - the other being the
affirmative view. It goes without saying that the view there
expressed would more properly be presented to the legislature,
which has power to change the law. We do not understand the
author to argue in favor of the construction of this statute for
the reason that it is not an exception to the general rule.
The respondent, however, further suggests that if the
court would be of the opinion that it cannot give to the question
the construction which he seeks to put upon it, then he desires to
raise the question that his constitutional rights are violated by
this statute, and ask that under section 103 of the Practice Act

the case shall be transferred to the Supreme Court of this state in order that those rights may be adjudicated.

No suggestion was made in the trial court that a constitutional question was involved, and it would seem that in fairness the question should have been presented there. Moreover, in a long line of decisions in this state, it has been held that an appeal to the Appellate court and the assignment of error, which the court has jurisdiction to consider, waives all constitutional questions. There is nothing in the language of section 102 that would indicate that it was the legislative intention to change that rule, and while the point was not specifically raised, cases decided in the Supreme court since the enactment of Section 102 of the Practice Act indicate that that high tribunal adheres to its former views on this subject. Edwardsville v. Cent. Telephone Co., 302 Ill., 362-4.

Moreover, we can hardly bring ourselves to believe that the question of constitutional right is urged here in good faith. This section of the Evidence Act is not different from other arbitrary rules of law, which are prescribed by statute enacted by the legislature, evidently in the belief that it is for the best interest of society that the rule should be as expressed in the statute. We might refer to the Statute of Limitations, where under some circumstances the testimony even of the defendant himself that he owed a debt would be unavailing; or certain sections of the Statute of Frauds where the arbitrary rules laid down for the good of all often result in hardship to the individual. The liberty that we enjoy is the liberty controlled by law and the law, in the nature of things, must be general rules of human conduct, which the sovereign power intervenes to enforce. Those rules are not always just, but generally speaking, in the long run make for justice. If it has happened that this general rule has resulted in a

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its former views on this subject. Edwards v. State, 102 Ill.
401, 302 Ill., 303-4.

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that we enjoy is the liberty controlled by law and the law, in the
nature of things, must be general rules of human conduct, which the
sovereign power intervenes to enforce. These rules are not always
just, but generally speaking, in the long run make for justice.
If it has happened that this general rule has resulted in a

specific injustice to the defendant, he may perhaps be solaced by the reflection that it is a debt he pays to civilization.

The motion to transfer to the Supreme Court is denied and the judgment of the trial court is affirmed.

AFFIRMED.

Johnston and McCurely, JJ., concur.

specific intention to the defendant, he may purchase a release by

the intention that it is a debt he pays to satisfaction.

The action to transfer to the Supreme Court is

limited and the amount of the trial court is affirmed.

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EQUITY PRINTING & TYPESETTING
CO., a Corporation,
Appellants.

Appeal from Interlocutory Order
of the Circuit Court of Cook
County.

DELIVERED THE OPINION OF THE COURT.

On September 23, 1925, the defendant, Equity Printing & Typesetting Company, with certain other defendants, entered its appearance, and on October 9, 1925, the complainant by leave of court filed an amendment to its bill of complaint.

In the amendment to the bill complainant prayed that an injunction might be granted against the defendant, Equity Printing & Typesetting Company, both as a copartnership and as a corporation, and that with other defendants it might be restrained from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, encumbering, or in any manner or way disposing of, or intermeddling with, any of the machinery, type, type metal, fixtures, appliances, money, bills receivable or other property, personal or real, which belonged to or was in the possession of said International Printing & Typesetting Company, or which had been acquired by its alleged successors in title by converting former property belonging to said International

2411 A 617

Appeal from Interlocutory Order
of the Circuit Court of Cook
County.

FRANK BROWN
vs.
EQUITY PRINTING & TYPESETTING
CO., a Corporation,
Appellants.

MR. PRESIDING JUSTICE KAY-HUNT
DELIVERED THE OPINION OF THE COURT.

The complaint in the judgment credited of the Inter-
national Printing & Typesetting Company, a corporation, and on
August 28, 1932, filed a creditor's bill, naming numerous parties
as debtors including the defendant, Equity Printing & Typesetting
Company, a corporation.
On September 28, 1932, the defendant, Equity Printing
& Typesetting Company, with certain other defendants, entered its
appearance, and on October 9, 1932, the complaint by leave of
court filed a statement in its bill of complaint.
In the amendment to the bill complaint prayed that
the defendant might be granted against the defendant, Equity
Printing & Typesetting Company, both as a copartnership and as a
corporation, and that with other defendants it might be restrained
from selling, assigning, transferring, delivering, negotiating,
discharging, receiving, collecting, encumbering, or in any manner
or way disposing of, or intermeddling with, any of the machinery,
type, type metal, fixtures, appliances, money, bills receivable
or other property, personal or real, which belonged to or was in
the possession of said International Printing & Typesetting Com-
pany, or which had been acquired by its alleged successors in
title by converting former property belonging to said International

Printing & Typesetting Co. into new or different property now in the possession of the said supposed successors to said International Printing & Typesetting Co. until the further order of said court.

On October 14th, 1925, at the September term of the court, upon reading the sworn bill of complaint, as amended, and an affidavit presented in support thereof, the court ordered that the writ of injunction issue as prayed and further "for good cause shown," the injunction issue without bond and without notice.

The bill as originally filed was verified by the complainant, who stated that he knew the contents thereof and that the matters and things contained therein were true of his knowledge, except as to those matters which were therein stated to be on his information and belief, and as to those matters he believed them to be true. A similar verification under oath of complainant was attached to the amendment to the bill of complaint.

On November 3, 1925, the defendant appellant filed its answer to the bill of complaint as amended, and in the answer denied that it had knowledge as to any assets owned and controlled by the International Printing & Typesetting Company, or held in trust for it, or that it had in its hands any real estate or any interest therein, or any other property which it was holding in its possession or control or in trust for the principal defendant, and denied that the debtor corporation had assigned or transferred its property to it, or that the Equity Printing & Typesetting Company was organized for the purpose of hindering, delaying and defrauding the complainant. It denied that the International Printing & Typesetting Company ever did business in

Printing & Typewriting Co. into new or different property now in the possession of the said supposed successors is said International Printing & Typewriting Co. until the further order of said court.

On October 14th, 1928, at the September term of the court, upon reading the sworn bill of complaint, as amended, and an affidavit presented in support thereof, the court ordered that the writ of injunction issue as prayed and further "for good cause shown," the injunction issue without bond and without notice.

The bill as originally filed was verified by the defendant, who stated that he knew the contents thereof and that the matters and things contained therein were true to his knowledge, except as to those matters which were therein stated to be on his information and belief, and as to those matters he believed them to be true. A similar verification under oath of complaint was attached to the amendment to the bill of complaint.

On November 8, 1928, the defendant again filed its answer to the bill of complaint as amended, and in the answer stated that it had knowledge as to any assets owned and controlled by the International Printing & Typewriting Company, or held in trust for it, or that it had in its hands any real estate or any interest therein, or any other property which it was holding in the possession or control or in trust for the principal defendant, and denied that the debtor corporation had assigned or transferred its property to it, or that the Realty Printing & Typewriting Company was organized for the purpose of hindering, delaying and defrauding the complainant. It denied that the International Printing & Typewriting Company ever did business in

the State of Illinois, or in the City of Chicago, under the name and style of the Equity Printing & Typesetting Company, a co-partnership, and averred that the International Printing & Typesetting Company had no lien, claim, interest or demand in or to any of the machinery or property as acquired by the Equity Printing & Typesetting Company at the time of the incorporation thereof.

The answer admitted that the Equity Printing & Typesetting Company was doing business as alleged in the bill of complaint, but denied that its property or any part of it should in equity or good conscience be applied to the satisfaction of any claim of the complainant.

The answer further denied that any fraudulent sale, transfer, assignment, gift, bailment, confidence or delivery of any property of the International Printing & Typesetting Company had been made to the defendants, or that the Equity Printing & Typesetting Company, or any of its officers or agents, or any person or persons acting in its behalf at any time ever received, obtained or held any property, real or personal, of any description, in a secret trust for the use of the International Printing & Typesetting Company, or for the purpose of hindering or defeating any of the just claims of the complainant.

All this was in response to allegations made in the bill of complaint as amended, of which the important and essential ones were positively verified not simply on information and belief, as defendant seems to think.

On November 10, 1925, appellant made a motion to dissolve the temporary injunction, and the court after considering the pleadings and hearing the arguments of counsel, denied the motion. It is from this order that the present appeal is taken. The propriety, therefore, of the order for an injunction at the

the State of Illinois, or in the City of Chicago, under the name
and style of the Equity Printing & Typesetting Company, a cor-
poration, and avowed that the International Printing & Type-
setting Company had no lien, claim, interest or demand in or to
any of the machinery or property as acquired by the Equity Print-
ing & Typesetting Company at the time of the incorporation there-
of.
The answer admitted that the Equity Printing & Type-
setting Company was doing business as alleged in the bill of
complaint, but denied that the property or any part of it
should in equity or good conscience be applied to the satisfac-
tion of any claim of the complainant.
The answer further denied that any fraudulent sale,
transfer, assignment, gift, bailment, continuance or delivery of
any property of the International Printing & Typesetting Company
had been made to the defendants, or that the Equity Printing &
Typesetting Company, or any of its officers or agents, or any
person or persons acting in its behalf at any time ever received,
obtained or sold any property, real or personal, or any descrip-
tion, in a fraudulent manner to the International Print-
ing & Typesetting Company, or for the purpose of converting the
defendants and to the just claims of the complainant.
All this was in response to allegations made in the
bill of complaint as numbered, of which the important and essential
facts were positively verified not simply on information and be-
lieve, as defendant seems to insist.
On November 16, 1926, appellant made a motion to
dissolve the temporary injunction, and the court after considering
the objections and hearing the arguments of counsel, denied the
motion. It is from this order that the present appeal is taken.
The necessity, therefore, of the order for an injunction at the

time it was first issued is not directly involved.

The complainant has made a motion to strike certain alleged certificates of evidence, which appear in the record, and its motion was reserved to the hearing. Upon an examination of the case, however, upon its merits, we do not find anything in these supposed certificates which we regard as material, and the motion will therefore be denied.

The original bill as amended was made under oath, and the answer of appellant was not verified. The defendant has argued the matter upon the theory that the original order for an injunction is before us for review. That is not the case. No appeal was taken from that order, and the only matter before us is the propriety of the order denying the motion to dissolve at the time that motion was passed on.

Defendant complains that no notice was given of the application for a preliminary injunction as was required by rule of the Circuit court, and calls attention to the fact that its appearance was on file at that time, but the defendant has waived the right to notice, if right it was, by making its motion to dissolve. Craig v. Craig, 175 Ill. App., 175; High on Injunctions, sec. 1615; Williams v. Chicago Exhibition Co., 188 Ill. 19; High v. Mulloney, 121 Ill. App. 503.

Defendant also complains that the injunction was issued without bond, but even if we agree that a bond should have been demanded by the court in the first instance, that would not justify the dissolution of an injunction otherwise properly issued. Defendant could protect its rights in that respect by making a motion that the proper bond be required. Drake et al. v. Phillips, 40 Ill., 388.

A motion to dissolve a temporary injunction made prior to the filing of an answer is ordinarily equivalent to a demurrer

to the bill, and is so considered. The filing of an answer denying the material allegations of the bill waived the right to demur to it, and since the answer was not sworn to there was nothing to support the motion to dissolve.

True, the amended bill waived answer under oath, but notwithstanding this defendant could have verified the answer and should have done so, if he desired to use the answer in making a motion to dissolve. If the answer had been verified it would have been necessary for complainant, upon the motion to dissolve, to have supported the allegations of his bill.

We will not assume that defendant answered a bill which was in fact demurrable. The actual situation on this record is that the court at the time it denied the motion to dissolve the injunction had before it an amended bill sworn to, the allegations of which defendant had admitted to be sufficient by answering. The bill was sworn to; the answer was not. There was therefore nothing before the court which would support a motion to dissolve. See Williams v. Chicago Exhibition Co., supra; Dunne v. County of Rock Island, 273 Ill., 53.

The order is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

to the bill, and is not considered. The filing of an answer denying the material allegations of the bill waived the right to demand so, and since the answer was not sworn to there was nothing to support the motion to dissolve.

Then, the amended bill waived answer under oath, but notwithstanding this defendant could have verified the answer and should have done so, if he desired to use the answer in making a motion to dissolve. If the answer had been verified it would have been necessary for complaint, upon the motion to dissolve, to have supported the allegations of his bill.

We will not assume that defendant answered a bill which was in fact demurrable. The actual situation on this record is that the court at the time it denied the motion to dissolve the bill had before it an amended bill sworn to, the allegations of which defendant had admitted to be sufficient by answering. The bill was sworn to; the answer was not. There was therefore nothing before the court which would support a motion to dissolve. The

Bill of Complaint - Plaintiff - John A. Smith - Defendant - John A. Smith

Label, 275 11, 22.

The order is affirmed.

ATTESTED.

John A. Smith and K. A. Smith, Jr., counsel.

Not done.

FILED.

22.

J. E. BURLISON,
Appellee, ✓

vs.

MIKESSELL BROTHERS COMPANY,
Appellant.

)
) APPEAL FROM MUNICIPAL COURT
)
) OF CHICAGO.
)

241 I.A. 617

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Mikesell Brothers Company, the defendant, from a judgment in the sum of \$6683.17 in favor of J. E. Burlison, the plaintiff.

The claim of the plaintiff is that the defendant was indebted to him for \$5867.39 with interest, for mica sold to the defendant by the J. E. Burlison Mica Company, a corporation; that the plaintiff was the actual bona fide owner of the claim against the defendant by assignment from the J. E. Burlison Mica Company.

The defense of the defendant was that the plaintiff was not an actual bona fide owner of the claim; and further that some of the mica, amounting in value to \$2626.21, was defective and not the kind agreed upon; that the defendant is entitled to recoup damages for the defective mica and also for the loss of profits amounting to \$3,560; and that therefore the defendant is not indebted to the plaintiff in any sum whatever.

The case was tried before the court without a jury.

During the year 1920 the J. E. Burlison Mica Company sold large quantities of mica to the defendant. No complaint was made by the defendant as to the quality of any of the mica except as to three shipments which were made under orders of the defendant of June 11, 1920, referred to as Order Nos. 18510 and 18511.

APPEAL FROM NEW YORK COURT

J. E. BURKE

Appellate

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RECEIVED

Appellate

241 I.A. 617

THE COURT OF APPEALS OF THE STATE OF NEW YORK

This is an appeal by Michael H. Hirschman, Company.

The defendant, from a judgment in the sum of \$4483.14 in favor

of J. E. Burke, the plaintiff.

The claim of the plaintiff is that the defendant was

liable to him for \$4483.14 with interest, for which he is

defendant by the J. E. Burke Hirschman Company, a corporation; that

the plaintiff was the actual bona fide owner of the claim against

the defendant by agreement from the J. E. Burke Hirschman Company.

The balance of the defendant was that the plaintiff

was not an actual bona fide owner of the claim and further that

even if the claim, according to view in Hirschman, was due to

him and the first agreed upon, that the defendant is entitled to

twenty percent for the defendant's claim and also for the sum of

profits according to 14, 15, and 16, and also according to the defendant's

and assigned to the plaintiff in any sum whatever.

The case was tried before the court without a jury.

During the year 1920 the J. E. Burke Hirschman Company

sold large quantities of wire to the defendant. No complaint was

made by the defendant as to the quality of any of the wire except

as to three shipments which were made under orders of the defen-

dant of June 11, 1920, ordered to an Order No. 18210 and 18211.

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There was considerable correspondence between the J. E. Burleson Company and the defendant. Many of the letters related to the failure of the defendant to make prompt payments. On July 5, 1920, the J. E. Burleson Company wrote to the defendant, saying: "When I was in to see you, you was to see about sending down some money, but so far I have not heard anything about this and we need this money. Please look after this at once."

In reply to this letter the defendant wrote, "Your letter of July 5th is received and we have instructed our accounting department to send you remittances immediately in settlement of such shipments as have been received from you."

July 9, 1920, the J. E. Burleson Company wrote to the defendant as follows: "Now so far you people have failed to comply with my request about sending money down here and have talked very indifferent about it; now up to this time our shipments to you runs around \$4000, and we are preparing another shipment on both the iron patterns."

Again on July 25, the J. E. Burleson Company wrote the defendant, saying: "Now I don't like to do business with men who do not live up to their contract. Now today we are shipping you 200 pounds of selected mica, one of the finest cases of flat iron mica that we have ever shipped out, this is to cut the large size $2\frac{1}{2}$ X 6, this puts your account between \$6000 and \$7000 and tomorrow another case will follow. Now you have failed to answer several of our letters. Hoping that you will not let this happen any more. We have our payrolls to take care of and if our customers do not help us we cannot hire our labor here or get out anything. We ask you to forward us a check for at least \$5000."

In a letter dated July 31, 1920, written by the defendant to the J. E. Burleson Company, the defendant said: "We wish

There was considerable correspondence between the J. H. Harrison Company and the defendant. Many of the letters related to the failure of the defendant to make prompt payments. On July 5, 1930, the J. H. Harrison Company wrote to the defendant, saying: "When I was in to see you, you was so busy about sending down some money, but so far I have not heard anything about this and we need this money. Please look after this at once."

In reply to this letter the defendant wrote, "Your letter of July 5th is received and we have instructed our accounting department to send you remittance immediately in settlement of such shipments as have been received from you."

July 9, 1930, the J. H. Harrison Company wrote to the defendant as follows: "Now as far as you people have failed to comply with my request about sending money down here and have failed very indifferent about it; now up on this time our shipments to you runs around \$4000, and we are preparing another shipment on both the iron pattern."

Again on July 22, the J. H. Harrison Company wrote the defendant, saying: "Now I don't like to do business with men who do not live up to their contract. Now today we are shipping you 200 pounds of material when, one of the latest orders of that kind was sent we have ever shipped you, this is to put the large size of X 6, this puts your account between \$2000 and \$3000 and to narrow another time will follow. Now you have failed to answer several of our letters. Hoping that you will not let this happen any more. We have our payable to take care of and if our customers do not help us we cannot hire our labor here or get our material. We ask you to forward us a check for at least \$2000."

In a letter dated July 31, 1930, written by the defendant to the J. H. Harrison Company, the defendant said: "We wish

to assure you that we are doing all in our power to pay your accounts promptly and wish to work with you at all times."

August 18, 1920, the J. E. Burleson Company wrote the defendant as follows: "We have been advised by our bank that our draft made on you for \$5000 has been returned and no attention paid to it with no excuse as to why it was not paid. Now, gentlemen, if we run our business we have to meet our payrolls, and we cannot meet our payrolls unless our customers pay us. Now we like to do business with you and hope to continue to sell you mica, but at the same time we do business for what money we make. We have asked you time and again for a check covering account and we get no results. We just received your telegram asking for prices on 25 pounds of No. 3 clear mica, now we are not going to make you any further price or shipments until there is some satisfactory settlement of your account. Now we simply cannot wait much longer on you to pay your account. Unless we have check from you in settlement of your account by the 25th of this month we will be forced to place this account in the hands of R. G. Dun & Co. for collection at that time. When you make your settlements we are ready to make you further shipments on your various orders as the mica is packed and waiting to hear from you with checks. We hope that you will on receipt of this letter take the matter up and not lay it aside until the check is mailed to us."

On August 19, 1920, the defendant wrote to the J. E. Burleson Company as follows: "Referring to your several previous letters regarding your accounts against us, and dwelling on our business relations in general, please be advised that I am instructing our Accounting Department to immediately send you substantial remittances and these remittances will be followed up almost daily until your account is settled in full. There has been a great slump in this territory in the demand for mica, owing to the slowness of business at the hands of the Heating element people. These

to ensure you that we are doing all in our power to pay your account promptly, and wish to work with you at all times.

On August 18, 1933, the J. M. Harrison Company wrote the defendant as follows: "We have been advised by our bank that our draft made on you for \$2500 has been returned and no attention paid to it within ninety days as to why it was not paid. Now, gentlemen, if we have no business we have to meet our payables, and we cannot meet our payables unless our accountants pay us. Now we like to do business with you and hope to continue to sell you more of the same time as the business for what money we make. We have asked you time and again for a check covering account and we get no response. We just received your telegram asking for prices on 25 yards of No. 1 cloth, and now we are not getting to make you any further price or shipment until there is some satisfactory acknowledgment of your account. Now we simply cannot wait much longer on you to pay your account. Unless we have check from you in return for our account by the 25th of this month we will be forced to place this account in the hands of a collection agent. When you make your settlement we are ready to make your former shipment on your various orders on the same in packing and return it back from you with shipping. We hope that you will be prompt in this matter and the money up and not let it wait until we have to handle it as no. 2.

"On August 19, 1933, the defendant wrote to the J. M. Harrison Company as follows: "Referring to your account, please advise me regarding your account and we will settle on the same as soon as possible. It may be settled next week or later. The defendant's statement will be followed up about daily until your account is settled in full. There has been a great deal of discussion in the board of directors, owing to the delay in the settlement of the account of the Harrison Company. There

people are very slow in making remittances to us for shipments, and all this has had a tendency on our part to hold up payment of your accounts, as we decided some time ago that if these accounts were not settled in sixty days, we would take the mica back and return it to you. The situation is now improving and we feel more encouraged over the outlook. If you will be a little patient with us, we think everything will work out satisfactorily."

August 21, 1920, the J. E. Burleson Company wrote as follows to the defendant: "Replying to your letter of the 19th. File X786. When we buy mica we pay for it. And we do not expect the parties whom we buy it from to take it back. And when you order mica from us and we fill an order we are not going to take the mica back. We can't help whether your customer pays for it or not; and if you expect this you better not order any mica from us. Now if you take orders in our name, we will go after the customer for pay instead of coming after you. But you are absolutely responsible to us for every pound of mica that you order from us and we ship to you. And we have nothing at all to do with your collections. We would not sell you or anybody else and take the excuse that you have offered that you would take the mica back and ship it back to us. We have never seen this intimated in your letters before and if we had we would have told you that we would not do business this way. Now our terms of sale to all, are 10 days 2% off or net cash in 30 days from date of bill, and we expect to make settlements this way, and are willing to fill your orders on this basis. Now on the account of your neglecting to settle with us we have had to borrow money and pay interest on it in order to meet our payrolls. You state that we should not draw a draft on you, in answer to this we would state that you should pay us promptly and save us from drawing a draft on you. Now on Monday

we will go to shipping out on your orders again, but we must have prompt settlements according to our terms. If you get in a shape that you can't pay, you give us a 30 or 60 days' acceptance that we can use in the Banks here so as to take care of our business. Then we will not have any friction and everything will run along smoothly."

August 23, 1920, the defendant wrote the following letter to the J. E. Burleson Company: "Will you kindly arrange to suspend shipment on our orders 18510 and 18511, calling for 1000 pounds of 1 3/4 x 6" and 1000 pounds of 3 1/4 x 6", respectively. The party to whom we have sold this Mica is in financial difficulty and has asked us to hold up shipments on his two orders."

August 23, 1920, the defendant again wrote the J. E. Burleson Company as follows: "Your letter of August 18th is received, regarding our refusal to honor your draft for \$5000.00. I think our Accounting Department has mailed to you several vouchers in part settlement of your accounts against us. I wrote you very fully regarding the Mica situation in this territory on August 19th, and we want to say to you that if you do not want to do business with us in the regular way without pressing us all the time for settlement, we will discontinue our business relations with your company entirely. We have been endeavoring to favor you with orders, even at higher prices than quoted to us by other producers and we do not like the attitude expressed by you in this letter at all, particularly in view of the efforts we have put forth to assist you in furthering a financial project to help you in developing your properties. We would just as soon discontinue our business relations with your company entirely, if you cannot be a little more lenient with us and instead of pressing us all the time, show a tendency to work with us. A considerable amount of the Mica covered by your draft for \$5,000.00 is still in our

Then we will have my kitchen and everything will run along
we can get in the bank now so as to take care of our business.
That you can't pay, you give us a 50 or 55 days' acceptance that
strongest satisfaction according to our terms. If you get in a shape
we will go to business and on your return again, but we must have

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and the other examine the system and if we find the system is not

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warehouse here undelivered because of a slump in the business of our customers, and if you say the word we shall be glad to return all this mica to you for full credit and send you no more orders. When you were here, we endeavored to explain these matters to you and you seemed to understand them, but your recent correspondence shows you have adapted entirely different tactics. We do not like your threats to place accounts against us in the hands of R. G. Dun & Company and the writer is of the opinion that it would be much better in view of your disposition to discontinue sending orders entirely."

August 24, 1920, the defendant wrote the following letter to the J. E. Burleson Company: "Your letter of August 19th is received, and all I can say to you is that the writer has given instructions to our Mr. Elizer to discontinue sending you any further inquiries or orders for mica, in view of the opinion you have of this company and the attitude you have recently taken with respect to your accounts against us. We think the only course for us to follow is to discontinue our business relations with the J. E. Burleson Mica Company, then there will be no friction. I have also instructed Mr. Elizer to return to you for credit the mica which we have on hand at our warehouse received from your company which we have been holding here pending instructions from our customers to deliver to them. You evidently do not wish to work with us along the lines necessary to handle this trade to the best advantage, which means we must hold the mica here until they are ready to use it and pay for it, as we do not wish to deliver mica to the trade unless we are sure they have the money on hand to settle for the material. Under such circumstances we do not propose to hold the bag entirely and pay you in full for mica which has not been delivered to our customers, and as you are unwilling to give us any time to dispose

was known here immediately because of a wiring in the business of
the company, and if you say the word we shall be glad to return
all this time to you for full credit and send you no more orders.
When you were here, we endeavored to explain these matters to you
and you seemed to understand them, but your recent correspondence
shows you have adopted entirely different tactics. We do not like

your threats to place accounts against us in the hands of
Hart & Company and the writer is of the opinion that it would be
much better in view of your disposition to discontinue sending

August 24, 1930, the defendant wrote the following

Letter to the J. E. Business Company: "Your letter of August
first is received, and all I can say to you is that the matter
has given instructions to our Mr. Miller to discontinue sending

you any further inquiries or orders for more, in view of the
fact that you have at this company and the attitude you have recently
displayed will result in your accounts against us. We think the

only course for us to follow is to discontinue our business rela-
tions with the J. E. Business Company, and that will be
the result. I have not indicated in which is wrong in the

the credit the bill which we have to send to you payment of
which you have refused to pay. We have been called upon to pay
the bill and we are unable to do so. The bill is

in the hands of the bank and we are unable to get it out of
the bank to the bank, and the bank is unable to get it out of
the bank. We have been called upon to pay the bill and we are

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of this mica, which in view of our previous correspondence we understood was sent us on consignment, we have decided the best course is to drop all previous arrangements we have had with you. Furthermore, the writer will give no further activities to the matter of endeavoring to finance your mica properties."

August 23, 1920, the J. E. Burleson Company wrote the defendant as follows: "We are not going to take back any mica that we have sold you, for the very reason that we went to a very heavy expense to select this mica and trim it out according to your orders. It took three hands a solid month to trim and select this mica out suitable to cut these patterns. We never sell any mica to anybody and take it back. Then we have your letters urging us to make shipments of this mica right along. **** There was nothing ever intimated, in any of the conversations with you while in Chicago, nor in any of the correspondence, concerning selling you mica on Commission, we never sold any mica this way and would not do so, and never intimated that we would. We have your orders for all the mica shipped to you. We have always done business in a straight forward and up right way and have never had any trouble with any body before anything like this. It seems from your letters that you had an idea that we were able to sell you mica and wait indefinitely for the pay. ** This matter has all grown out of your neglect to carry out what you wrote us in the two letters first above referred to. ** We are enclosing you herewith a statement of your account up to date, and a part of this is now past due, and if you want to continue doing business with us, we will accept your Trade acceptances for this account for 60 days, with a check for the interest on same at the rate of 6% per annum. Now if we can do business with you along this line as outlined in this letter and previous letters, it

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will be perfectly satisfactory to continue business with you. Now where an account runs 30 days and is not paid at the end of this time that you make us a Trade Acceptance for the account for 60 days from that date, this will be satisfactory to us so long as we can use these at our banks here. Then on the other hand if you do not wish to do this, it will be satisfactory to discontinue business with you. And if you do not want to do any further business on the basis as outlined to you, we will ask you to send us a check for your account in full. But we want you to distinctly understand that we are not going to take back any mica that we have prepared for you and shipped to you."

October 26, 1920, the J. E. Burleson Company wrote to the defendant as follows: "We wrote you some time ago and ask you to have sent down to us at least \$2000 on account, and you answered that you would have it sent down, and up to this writing we have received no check from you at all. Now we write to urge you to send us at least \$3000 down on your account, so we will receive the same before the first of the month if possible. As you know we cannot meet our payrolls unless our customers help us, by paying up their accounts when we are in need of same. Now unless you send this we will be in a very awkward position, and may do us considerable damage if we do not receive this remittance by the first of the month. And we ask you to please see that this money is sent at once."

November 13, 1920, the J. E. Burleson Company wrote to the defendant as follows: "Up to the present you are owing us \$6,711.00. Now we have a note that is due on the 10th of this month for \$5200, and we have ask them to held up to give us 10 days to raise this money, and we are expecting a check from you for a part of it, and they have notified us that they would sue

us on the 20th if we did not have it paid by that time. Now you must help us out with a check for at least \$3000 or we are going to suffer. ***"

November 23, 1920, the defendant wrote to the J. B. Burleson Company as follows: "Your several recent letters regarding payment of your accounts have been duly received and carefully noted. The writer has instructed our Treasurer to immediately take steps to pay up your accounts, and I understand that during the last several days a few remittances have been made to you. Our collections have been very slow indeed, and some of our best customers are taking from sixty to ninety days to settle their accounts. We appreciate the leniency you have shown us, and will endeavor to reciprocate in the future by making payment of our accounts more promptly; but you will realize that if our customers delay their settlements with us it is embarrassing, and we hope you will continue to let us have as much time as possible to settle your accounts until our trade becomes more prompt in making remittances to us. We want to do all the business we can with you, and we appreciate the attention you have given all our orders."

December 11, 1920, the defendant wrote to the J. B. Burleson Company as follows: "Referring to our orders Nos. C-13510 and C-13511 for Second Quality Clear Mica, large enough to cut 1 3/4" x 6" and 3 1/2" x 6". We still have 50% of this mica on hand. Your first shipment of this mica was accepted by our customer, but subsequent shipments have been refused by him because they are stained, and as the order specified No. 2 clear Mica this customer would not accept the material. However, we were able to dispose of all the mica except the first shipment from you at less money than we quoted our customer. We still have left about 400 pounds of the full flat iron pattern and 300 pounds

as we are sure if we did not have it paid by that time. Now you
will have to wait a check for at least \$5000 or we are going

to tell you.

December 22, 1930. The defendant wrote to the T. H.

plaintiff, "You are going to tell me that you have received the

plaintiff's money. The money has been paid to the plaintiff and

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of the half flat iron pattern, which we have offered to prospective customers at the same price as you quoted to us, namely, \$3.25 on the half flat iron pattern and \$4.25 on the full flat iron pattern. The writer thought he could depend upon the Burleson Mica Company to ship us material exactly as specified, and therefore did not check up your shipments until the second lot was refused by our customer. We are instructing our Shipping Department to return to you for full credit all the mica we have on hand and which we cannot dispose of at the prices invoiced to us. This is the reason you have not had settlement of our account. If you had advised us before that you could accept a reduction of about \$1.00 per pound in the price of this mica we might have been able to dispose of the material at this cost price."

On December 17, 1920, the defendant wrote to the J. E. Burleson Company as follows: "In reply to your favor of the 14th instant, wherein you state that Mica on our orders C-18510 and C-18511 was the same quality as called for on our order and exactly what you agreed to furnish us, please be so good as to look at our order and you will note it calls for second quality, clear Mica. As you have furnished us stained Mica in this instance, we do not see how you can claim that this is the same grade of Mica as the order calls for. If you doubt our word in this instance, we shall be glad to give you the name of our customer who is to be the ultimate judge of this and you will then verify our statement that all he took of your Mica was the first shipment, as he claims that the first shipment was up to your specifications but the following shipment was stained Mica and had nothing clear about it. Regretting that this has happened and assuring you that if we had been able to dispose of this Mica elsewhere at cost price, we would have done so, we are."

The first notice that was given to the J. E. Burleson

of the half first from pattern, which we have offered to purchase five quantities of the same price as you quoted to us, namely, \$2.25 on the half first from pattern and \$4.25 on the half first from pattern. The writer thought he could depend upon the Knickerbocker Company to ship us material exactly as specified, and therefore did not check up your shipments until the second lot was returned by our customer. We are investigating our shipping department to return to you for full credit all the time we have on hand and which we cannot dispose of at the prices involved to us. This is the reason you have not had settlement of our account. It has been advised as before that you could accept a reduction of about \$1.50 per pound in the price of this time we might have been able to dispose of the material at this cost price."

On December 14, 1920, the defendant wrote to the U. S. Garment Company as follows: "In reply to your letter of the 14th instant, wherein you state that when on our orders 5-18810 and 5-18811 was the same quality as called for on our order and we fully expect you to be satisfied with the quality of the goods as we have at the time and you will note it is the same quality, color, etc., as you have indicated as ordered from the Knickerbocker Company. We have not yet had the goods and claim that is the same quality as when the order was for. If you doubt our word in this instance, we shall be glad to give you the name of our customer who is to be the Knickerbocker Company at this and you will have every one satisfied that all the goods of your time and the first shipment, as we claim that the first shipment was up to your specifications and that the second shipment was stained with and missing about 15%. Regarding that this has happened and assuming you that if we had been able to dispose of this time we might have been able to dispose of the material at this cost price."

The first letter from the U. S. Garment Company to the U. S. Garment Company was dated December 14, 1920.

Mica Company indicating that the defendant would rescind the orders Nos. C-18810 and C-18811, was contained in the letter of December 11, 1920, set out above, from the defendant to the J. E. Burleson Company. The Mica referred to in this letter had been shipped to the defendant on July 3, 1920 and August 23, 1920. It will be noted therefore, that nearly six months intervened between July 3, 1920, and December 11, 1920, the date of the letter. Furthermore the complaint was made by the defendant only after the J. E. Burleson Company had made repeated demands on the defendant for the payment of its account with the J. E. Burleson Company.

The first contentions of counsel for the defendant are that the amended affidavit of the plaintiff in regard to the assignment of the claim does not comply with section 18 of the Practice act; and furthermore that the assignment was not proved by the corporate records of the J. E. Burleson Company. Section 18 of the Practice act, chapter 110, provides as follows: "The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title."

The amended affidavit of the plaintiff in respect of the assignment is as follows: That the plaintiff "is the actual and bona fide owner of the claims set forth in the above statement of claim, having acquired title to the same by assignment upon valuable consideration duly made by said J. E. Burleson Mica Company, a North Carolina corporation, on December 18, 1920."

Counsel for the defendant contends that the affidavit

...the defendant's... would resolve the
...was contained in the letter of
...December 11, 1930, not only above, from the defendant to the J. E.
...The letter referred to in this letter had been
...on July 3, 1930 and August 23, 1930. It
...will be noted therefore, that nearly six months intervened between
...July 3, 1930, and December 11, 1930, the date of the letter.
...the defendant only after the J.
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...for the defendant
...the amended affidavit of the plaintiff in regard to the
...of the claim does not comply with section 13 of the
...and furthermore that the assignment was not proved
...by the corporate records of the J. E. Harrison Company. Section
...of the plaintiff's amended affidavit as follows: "The
...and John E. Harrison and John E. Harrison the owner of any share in either
...negotiable, negotiable or otherwise assigned, any one thereof
...in his own name, and as such in his capacity as owner of his
...affidavit, where pleading is not required, allege that he is the
...owner John E. Harrison and not John E. Harrison and when he
...assigned title."
...The amended affidavit of the plaintiff in response to
...the assignment is as follows: "That the plaintiff 'is the actual
...and John E. Harrison the owner of the shares and that in the above assignment
...of title, having assigned title in the same by assignment upon
...plaintiff's declaration only made by said J. E. Harrison and
...Company, a party to the assignment, on December 11, 1930."

...for the defendant and that the affidavit

of the plaintiff "should have set forth 'how' he received" the assignment. Counsel for the defendant cites authorities which hold that section 18 must be strictly complied with.

We do not think that the objection of counsel for the defendant that the affidavit fails to show "how" the plaintiff acquired title to the claim, is well taken. We are of the opinion that the allegations in the affidavit that the plaintiff acquired title by an assignment from the J. E. Burleson Company, a corporation, for a valuable consideration, sufficiently comply with the provision of section 18 requiring an assignee to state "how" he acquired title.

We are also of the opinion that the assignment of the claim to the plaintiff was properly proved. Counsel for the defendant maintains that proof was not properly made as required by sections 15 and 16 of the Evidence act, chapter 51. These sections are as follows: Section 15: "The papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier, or other keeper of the same. If the corporation or incorporated association has a seal, the same shall be affixed to such certificate."

Section 16: "The certificate of such clerk of a court, city, village, town, county, or secretary, clerk, cashier, or other keeper of such papers, entries, records or ordinances, shall contain a statement that such person is the keeper of the same, and if there is no seal, shall so state."

In the case at bar the evidence showed the existence of the corporation, the J. E. Burleson Company, by the articles of incorporation, but the evidence does not show by the corporate records the assignment of the claim to J. E. Burleson. The evidence by oral testimony showed that at a meeting attended by

all of the directors and stockholders of the corporation, a vote was taken and the assignment to J. E. Burleson was agreed upon; that minutes of the meeting were taken but that the minutes had never been transcribed into the minute book of the corporation; that the minutes were lost and after search made for them could not be found; that no entries had been made in the corporate books of the corporation since 1917.

In regard to proof by parol evidence of corporate acts, Fletcher on Corporations, vol. 4, section 2796, pp. 4052, 4053, 4054, states as follows: "A statute requiring the directors of a corporation to keep full entries of their transactions, but not providing that parol evidence shall be inadmissible to prove their acts when no record is kept, does not render such evidence inadmissible. Parol evidence is frequently introduced to show matters not of record. The mere fact that the corporate minutes were made up informally does not destroy their force where they are admittedly correct, nor does a failure to make a record of proceedings at the time invalidate them. As a general rule a vote or other action on the part of the directors need not be by a formal resolution entered on the minutes or records of the corporation, unless it is expressly required, and when it is not a matter of record, it may be proved by parol evidence. And of course, they may be proved by parol where it is shown that the record has been lost, and also where the books have been destroyed, what was done at the meeting may be shown by other evidence."

Counsel for the defendant contends that the court erred in refusing to allow the defendant to make the following proof offered by the defendant: "That Mikesell Brothers, defendant, notified J. E. Burleson, who is the president of the J. E. Burleson Mica Co., at the time he was here in Chicago, that the material was to be No. 2 clear mica, and that it was to be used for

All of the minutes and resolutions of the corporation; a vote was taken and the resolution to L. E. Johnson was adopted; that the minutes of the meeting were taken but that the minutes had never been transcribed into the minute book of the corporation; that the minutes were lost and other records made for them could not be found; that no entries had been made in the corporate books since 1934.

In regard to proof by oral evidence of corporate acts, Littleton on Corporations, vol. 4, section 5752, pp. 4932-4933, states as follows: "A statute regarding the records of a corporation to keep full records of their transactions, but not providing that such evidence shall be inadmissible to prove their acts when no record is kept, does not render such evidence inadmissible. Oral evidence is frequently introduced to prove facts not of record. The mere fact that the corporation's records were made up internally does not destroy their value as evidence. They are admissible evidence, not being a failure to make a record of proceedings at the time the act was done. As a general rule a rule or other action on the part of the corporation does not require a formal resolution entered on the minutes or records of the corporation, unless it is expressly required, and when it is not a matter of record, it may be proved by oral evidence, and if proved, they may be proved by oral evidence if it is shown that the records have been lost, and also where the books have been destroyed."

Johnson for the defendant contends that the court erred in refusing to allow the defendant to make the following proof offered by the defendant: Robert Johnson, brother, deceased, was president of the corporation, and at the time he was here in Chicago, that the records of the corporation were lost, and that it was to be used as

insulation in the flat iron trade; that the Mikesell Brothers Co. did inform the plaintiff that they had an order for this kind of mica to be used in flat irons for this particular customer and that the defendant did furnish the customary requisition in shape as to what it required to be used by this particular customer; that the defendant company after the order was signed received a shipment of this material and the shipment was forwarded to the Security Electric Mfg. Co., being the customer that was indicated to the plaintiff, and that the Security Electric Mfg. Co. received the material and used it in the manufacture of flat irons; that said material was used for the purpose of insulation; that after the usage by this customer of this material that by actual test it was found it contained mineral spots or deposits which made it unfit for insulation; that it ruined a large part of the material of the customer, and the customer returned the unused part of the material to Mikesell Brothers Co. with the complaint that the material was not of the kind that could be utilized for insulation of electric flat irons; that the mica where the insulation took place burned through and made the iron useless, and at the time defendant made the contract with the plaintiff the plaintiff was told that we were buying this material for resale and it was the business of Mikesell Brothers Co. to resell this material to this particular customer and thereby make a profit of seventy-five cents a pound on two 1,000 pound shipments, and that the material was returned and the balance of the material that was on hand at the warehouse of Mikesell Brothers Co. was examined by this witness and all the material was practically the same kind, and thereupon a notification was given to the plaintiff company by letter of the defective material and that the same could not be utilized for the purpose for which it was intended and afterwards Mikesell Brothers Co. attempted to sell the material to other customers, but could find no one to

use it and the material was then returned on December 20th to the plaintiff company, and that the customer for whom this mica was prepared refused to accept any further shipments of this particular mica from Mikesell Brothers Co.; that Mikesell Brothers Co. sustained damages by reason of said refusal in the sum of \$3,932.01, which Mikesell Brothers Co. asked to be recouped against the claim of the plaintiff in this proceeding."

The above offer of proof was made in the following circumstances. Fred Elizer, assistant sales manager for the defendant, was testifying as a witness on behalf of the defendant. Immediately preceding the offer of the defendant Elizer had been examined as follows:

"Q. Now, Mr. Elizer, at the time you signed these orders, C-18510 and C-18511, had you sold any part of this mica to anybody?

A. I had sold it all.

Q. To whom?

A. To the Security Electric Manufacturing Company. Order C-18510 was sold for \$4.00 per pound and C-18511 at \$5.00 per pound.

Q. At what profit?

Mr. Ogden: I object, if the court please, and move to strike out the witness' answer.

The Court: I will sustain the objection."

At this point of the examination of Elizer the defendant made the offer of proof in question. We think that the offer was premature; and furthermore, that it was largely a statement of conclusions and not precise facts.

In the case of Chicago City Ry. Company v. Carroll, 206 Ill. 318, in discussing the procedure in regard to an offer of proof, the court said (p. 329): "If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand and proceeded far enough that the question relative to

the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

In the case of People v. Elliot, 272 Ill. 592, the court said (p. 597): "When the counsel for the defendants made an offer of proof the judge suggested to him that the proper way was to ask questions and let the court rule on them. The court was right."

The rule in regard to an offer of proof requires that the facts and not conclusions must be specifically stated. Lucas et al. v. Beebe, 88 Ill. 427, 430; Martin v. Hertz, 224 Ill., 84, 88, 89; Court of Honor v. Dinger, 123 Ill. App. 406, 416, 417; Weld v. First National Bank of Englewood, 166 Ill. App., 8, 11, 12.

We do not think that the trial court erred in denying the offer of proof.

The defendant has assigned error on the action of the court in refusing another offer of proof by the defendant. The offer was as follows: "Now I wish to prove by the witness Mr. Osterman that on or about the month of June, 1920, that he gave an order to Miksell Brothers Company, the defendant, for the purchase of mica for flatiron purposes, and that subsequent to the date of the giving of the order that Mr. Elizer then had a conversation and made a contract with the plaintiff in this case, and that the purchase was for mica at \$5.00 a pound and \$4.00 a pound for the other order, and that in pursuance of that Miksell Brothers shipped this to the customer and he used a portion of it, and they used a portion of it; he made a test of it and found the mica had mineral stains and therefore shorted on the inside of the iron, and by reason of the mineral stains on said mica that he

was obliged to cancel the order that he had given Nikesell Brothers Co."

This offer involves questions similar to the offer which we have previously discussed. Furthermore the evidence does not show that the defendant had any contract with the J. E. Burleson Company in regard to mica which the defendant might sell to Osterman.

We do not think that the trial court erred in denying the offer of proof.

Counsel for the defendant contends that the court erred in allowing witnesses on behalf of the plaintiff to testify in regard to a sample of mica which was introduced in evidence. We do not deem it necessary to enter into a detailed discussion of counsel's contentions in this respect, as the rule is well settled that where the trial is before the court without a jury the admission of improper evidence is not ground for reversal, where there is proper evidence to justify the judgment. Keilling v. Northrup, 215 Ill., 196, 198; The Merchants' Despatch Transportation Company v. Joesting, 89 Ill. 152, 155.

On the question whether the mica was according to specifications the evidence is conflicting. On behalf of the plaintiff four witnesses testified. The substance of their testimony was that in the trade there was no such phrase as "No. 2 clear mica;" that No. 2 Mica meant mica with spots or stains; that when the orders for the mica were written, J. E. Burleson told Elizer that there was no such thing as No. 2 clear mica; that No. 2 had spots or stains; and that Elizer wrote on the orders the words, "Black or No. 2."

On behalf of the defendant one witness, Elizer, testified. The substance of his testimony was that he told J. E. Burleson, the president of the J. E. Burleson Company, that his, Elizer's, customer required "second clear quality flatiron mica;"

that Burleson said he would give him, Elizer, "the right kind of mica to take care of" his, Elizer's, customer; that the mica had metallic stains and that his customer returned it to him, Elizer; that he, Elizer, does not know who wrote the words "Black or No. 2" on the orders for the mica; that when the orders were delivered to Burleson the words were not on the orders.

In this state of the evidence the finding of the court should not be disturbed. In the case of The Illinois Central Ry. Company v. Gillis, 68 Ill., 317, the court said (p. 319): "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances by fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." To the same effect are the following cases: Bradley v. Palmer, 193 Ill., 15, 89; Carney v. Sheedy, 295 Ill., 78, 83. The finding of a court is entitled to the same weight and consideration as the verdict of a jury. Fisk v. Hopping, 169 Ill., 105, 108.

Counsel for the defendant further contends that the court erred in refusing certain propositions of law requested by the defendant.

As we are of the opinion that the judgment of the trial court was in accordance with the law and the evidence, it is immaterial whether the court ruled correctly on the propositions of law. Commercial State Bank of Forrester v. Folkerts, 200 Ill. App., 385, 391, 392; Fuchs & Lang. Mfg. Company v. R. J. Kittredge & Company, 146 Ill. App., 350, 371; Stone v. Mulvaine, 119 Ill. App. 443, 456

The judgment of the trial court is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

OTTO A. SOMMER,
Defendant in Error,

v.

A. J. ZECH and JOHN H. OMAN,
Plaintiffs in Error.

)
) ERROR TO
)
) CIRCUIT COURT.
)
) COOK COUNTY.
)

241 I.A. 617

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of trespass brought by Otto A. Sommer, the plaintiff, against A. J. Zech and John H. Oman, the defendants, to recover damages for injuries which it is alleged the defendants inflicted on the plaintiff by assaulting and beating the plaintiff.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$1500, and the court entered judgment on the verdict. From the judgment the defendants have prosecuted this writ of error.

The defendant, Zech, has filed a brief, but the defendant, Oman, has not.

The alleged assault and battery occurred in a soft drink parlor, where the plaintiff and the defendants were drinking. The plaintiff was severely injured. He was in a hospital for about six weeks. His arm was broken and over his right eye there was a laceration which had to be sewed up. He has not recovered the full use of his arm. It lacks about twenty-five per cent of being normal. The bill for medical services amounted to \$200.

The grounds on which the defendants ask for a reversal of the judgment are principally, (1) that the judgment is manifestly against the weight of the evidence; (2) that the court erred in denying the defendants' motion for a continuance; (3) that an instruction given at the request of the plaintiff is erroneous.

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...TATTOO UNIT TO POSITION THE INFLUENCE NOT TO BE OF THE ...

This is an action of trespass brought by Otto A. Hansen, the plaintiff, against J. E. Beck and John H. Hansen, the defendants, to recover damages for injuries which it is alleged the defendants inflicted on the plaintiff by assaulting and beating the plaintiff. The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$100.00, and the court entered judgment on the verdict. From the judgment the defendants have prosecuted this writ of error. The defendant, Beck, has filed a brief, but the defendant, Hansen, has not.

The alleged assault and battery occurred in a cold dining
parlor, where the plaintiff and the defendants were drinking. The
plaintiff was severely injured. He was in a hospital for about
six weeks. His arm was broken and over his right eye there was a
laceration which had to be sewed up. He has not recovered the full
use of his arm. It takes about twenty-five per cent of being
normal. The bill for medical services amounted to \$200.

The grounds on which the defendant was held for a retrial of the judgment are substantially: (1) that the judgment is manifestly wrong; (2) that the judgment is manifestly wrong; (3) that an injustice has been done to the plaintiff by the judgment.

The evidence in regard to the alleged assault and battery is conflicting. According to the testimony of the plaintiff, who was the only witness on his behalf, Oman hit him with his fist and knocked him down, and while he was down Oman and Zech kicked him. The plaintiff testified in substance that he had known Zech for two years, but had never seen Oman before; that he did not have any conversation with either Oman or Zech; that they and others "had quite an argument together;" that Oman started to fight with Zech and hit him with his fist; that Zech did not fall and did not strike back; that he, the plaintiff, attempted to go out the back way through a rear room separate from the front barroom; that he got as far as the inner door when Oman rushed Zech past him yelling at Zech, "If you haven't got enough now I will give you some more;" that when he, the plaintiff, got into the rear room Oman hit him with his fist and knocked him down, and Oman and Zech kicked him; that Oman kicked him in the arm and back of the head; that he, the plaintiff, got up and said, "why do you fellows want to jump on me;" that he then went out, saw a doctor, and went to a hospital.

According to the abstract the plaintiff testified that
rushed
Roy Oman struck Zech, and Zech past him, the plaintiff, but the transcript of the plaintiff's testimony in the record shows that the plaintiff testified that it was John Oman.

August Greenwald, a witness on behalf of the defendants, testified that the fight between Zech and Oman took place in the front room; that Oman knocked Zech down, and that Zech lay on the floor five or ten minutes; that he did not see anybody strike the plaintiff and did not see Zech kick him; that he, the witness, "did not see these people at any time in the back room."

Zech testified that he, the defendant, John H. Oman, Roy Oman, son of John H. Oman, and some friends were standing

The evidence in regard to the alleged assault and battery is conflicting. According to the testimony of the plaintiff, who was the only witness on his behalf, Oman hit him with his fist and knocked him down, and while he was down Oman and Zach kicked him. The plaintiff testified in substance that he had known Zach for two years, but had never seen Oman before; that he did not have any conversation with either Oman or Zach; that they and others "had quite an argument together"; that Oman started to fight with Zach and hit him with his fist; that Zach did not fall and did not strike back; that he, the plaintiff, attempted to go out the back way through a rear room separate from the front bedroom; that he got as far as the inner door when Oman rushed back past him yelling at Zach, "If you haven't got enough now I will give you some more;" that when he, the plaintiff, got into the rear room Oman hit him with his fist and knocked him down, and Oman and Zach kicked him; that Oman kicked him in the eye and back of the head; that he, the plaintiff, got up and said, "why do you fellows want to jump on me;" that he then went out, saw a doctor, and went to a hospital.

According to the abstract the plaintiff testified that ^{he} saw Oman strike Zach, and Zach past him, the plaintiff, but the transcript of the plaintiff's testimony in the record shows that the plaintiff testified that it was John Oman.

Against Greenwald, a witness on behalf of the defendants, testified that the fight between Zach and Oman took place in the front room; that Oman knocked Zach down, and that Zach lay on the floor five or ten minutes; that he did not see anybody strike the plaintiff and did not see Zach kick him; that he, the witness, "did not see those people at any time in the back room."

Zach testified that he, the defendant, John H. Oman, saw Oman, son of John H. Oman, and some friends were standing

at the bar shaking dice; that he, Zech, and Roy Oman get into an argument and that Roy Oman hit him and knocked him down, and that he was unconscious; that he did not come to his senses until the next morning; that he never hit or kicked the plaintiff; that he did not see the defendant, John Oman, strike the plaintiff; that he does not know whether he struck him or not.

Roy Oman testified on behalf of the defendants that he knew the plaintiff by sight; that he and Zech had a fight and that he knocked Zech down; that while Zech was down he put his foot against Zech's side and said, "Got enough," and that Zech said "Got enough;" that after he struck Zech he hit the plaintiff but did not knock him down; that the plaintiff staggered back; that there was a partition with two swinging doors between the saloon and the back room; that there was "a bench there," and that the plaintiff "went up against that;" that he, the witness, did not see his father strike or kick the plaintiff; that when he, the witness, struck the plaintiff they were in the front saloon, not in the back room.

Edward May, the proprietor of the soft drink parlor, testified that he saw Roy Oman strike Zech and knock him down; that this occurred in the front room; that Zech remained on the floor until someone picked him up and carried him back in the rear; that he did not see John Oman or Zech strike or kick the plaintiff; that the fight started in the barroom, but there was an altercation in the back room; that without doubt there was some quarrelling back there; that after Zech was struck in the front room, he walked to the rear portion; that he has no recollection whether John Oman or Roy Oman went into the rear room; that possibly Zech was in the rear room.

It will be observed that there are discrepancies on material issues in the testimony of the witnesses on behalf of the defendants. Zech says he was unconscious after Roy Oman

of the bar window; that he, John, and Roy Green had been in
engagement and that Roy Green hit him and knocked him down, and
that he was unconscious; that he did not come to his senses until
the next morning; that he never hit or kicked the plaintiff; that
he did not see the defendant, John Green, strike the plaintiff;
that he does not know whether he struck him or not.
Roy Green testified on behalf of the defendant that he
knew the plaintiff by sight; that he was back a light and
that he knocked him down; that while John was down he put his
foot against John's side and said, "Not enough," and that John
said "Not enough"; that after he struck John he hit the plaintiff
and did not move him down; that the plaintiff staggered back;
that there was a partition with two swinging doors between the
kitchen and the back room; that there was "a bench there," and
that the plaintiff "went up against that," that he, the witness,
did not see his father strike or kick the plaintiff; that when
he, the witness, struck the plaintiff they were in the front
kitchen, not in the back room.
Edward Ray, the proprietor of the self drink parlor,
testified that he saw Roy Green strike John and knock him down;
that this occurred in the front room; that John remained on the
floor until someone picked him up and carried him back to the
room; that he did not see John Green or John strike or kick the
plaintiff; that the light shined in the kitchen, but there was
no illumination in the back room; that Edward could have seen
anyone going in and out; that after John was struck in the
front room, he walked to the rear partition and he saw no one
else; that when Roy Green or Roy Green went into the rear room,
that possibly John was in the rear room.
It will be observed that there are discrepancies in
several places in the testimony of the witness on behalf of
the defendant. Each says he was unconscious at the time Roy Green

struck him and knocked him down. May states that after Zech had been struck in the front room, Zech walked to the rear room. Roy Omar says that after he knocked Zech down, he asked Zech if he had had enough, and that Zech replied "Got enough." May testified that possibly Zech was in the back room, and that without doubt there was some quarrelling back there.

In our opinion the verdict of the jury is not manifestly against the weight of the evidence. It was the special province of the jury to determine the credibility of the witnesses and the probability or improbability of their testimony; and a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Elevator Co. v. Hale, 201 Ill. 131, 146.

In regard to the defendants' motion for a continuance, the record shows that the case was set for trial on October 28, 1924, and was No. 7 on the trial call; that the case was continued until October 29, 1924, and on that day was No. 3 on the trial call; that on October 30, 1924, it was No. 2 on the trial call; that on each of these dates the plaintiff answered ready for trial; that it remained No. 3 on the trial call until November 6, 1924; that on that date it was continued to November 12, 1924, after much resistance by the attorney for the plaintiff, and both parties were instructed to be ready for trial on that date. On November 12, 1924, the defendants made a motion for a continuance. In support of the motion the trial attorney for the defendants made an affidavit as follows: "That on November 12, at 10:30 a. m. he called the home of John H. Oman on the telephone and a member of his family answered and said that Mr. Oman was in bed suffering from injuries; on urgent request Mr. Oman came to the phone; that affiant knows his voice and knows that it was defendant, John H. Oman; that he said that he was injured in an automobile accident on Sunday, November 9, 1924; that Dr. E. F. Fox is his physician and has been

that possibly Jack was in the back room, and that without doubt had had enough, and that Jack replied "Not enough." Ray testified Owen says that after he knocked Jack down, he asked Jack if he been struck in the front room, Jack replied to the rear room. Ray struck him and knocked him down. Ray stated that after Jack had been struck in the front room, Jack walked to the rear room. Ray Owen says that after he knocked Jack down, he asked Jack if he had had enough, and that Jack replied "Not enough." Ray testified that possibly Jack was in the back room, and that without doubt there was some conversation back there.

In our opinion the verdict of the jury is not manifestly against the weight of the evidence. It was the special province of the jury to determine the credibility of the witnesses and the probability or improbability of their testimony; and a court will not interfere with the verdict unless it is manifestly against the weight of the evidence. People v. ...

In regard to the defendant's motion for a continuance, the record shows that the case was set for trial on October 29, 1934, and was No. 7 on the trial call; that the case was continued until October 30, 1934, and on that day was No. 3 on the trial call; that on October 30, 1934, it was No. 2 on the trial call; that on each of those dates the plaintiff answered ready for trial; that it remained No. 2 on the trial call until November 6, 1934; that on that date it was continued to November 12, 1934, after which restoration by the attorney for the plaintiff, and both parties were instructed to be ready for trial on that date. On November 12, 1934, the defendant made a motion for a continuance. In support of the motion the trial attorney for the defendant made an affidavit stating: "That on November 12, at 10:30 a. m. he called the name of John H. Quinn on his telephone and a number of his family members and said that Mr. Quinn was in bed suffering from influenza and would be unable to appear in court; that all other persons named in the subpoenaed Mr. Quinn was at the house; that all other persons named in the subpoena had been notified that if they did not appear, they would be held in contempt of court." The court granted the motion.

attending him, and that his physician said he should not leave the house for one or two weeks and that the said Oman told affiant that his injuries are such that he cannot leave the house."

In further support of the motion, the defendant, Zech, made the following affidavit: "That J. H. Oman is a necessary witness for affiant to have; that plaintiff claims he was assaulted by defendants whereas said John H. Oman denies that the defendants assaulted him and will testify that defendants did not assault plaintiff; whereas it may be that the other co-defendant assaulted plaintiff but he did so in self-defense; that affiant had well expected to have said John H. Oman present as a witness and because he was a defendant he concluded it was not necessary to subpoena him and was surprised to find that he has been injured and cannot attend the trial of this case."

The following certificate of Dr. E. F. Fox was submitted to the court in support of the motion: "Mr. John H. Oman is at present under my care. He is suffering from contusion and lacerations of the face and left shoulder."

We are of the opinion that the court did not err in denying the defendants' motion for a continuance. We think the doctor's certificate was insufficient. The certificate does not state that Oman's condition was such that he could not attend the trial. Furthermore the court was not bound to grant a continuance on the certificate of a physician. Schnell v. Rothbath, 71 Ill. 83, 84; Marich v. Winter, 33 Ill. App. 36, 38.

The affidavit of the attorney for the defendants was not sufficient. It merely stated Oman's conclusions as to his injuries, without setting forth the facts on which Oman based his conclusions. Richmire v. Neaves, 182 Ill. App. 77.

Zech's affidavit is defective in that it does not state that what Zech expects to prove by Oman is true, or that he believes it is true. Wilhelm v. The People, 72 Ill. 468, 471;

...him, and that his physician said he should not leave

the house for one or two weeks and that the said Gunn said

...that the injuries were such that he cannot leave the house."

...the further support of the motion, the defendant, Gunn,

made the following statement: "That J. H. Gunn is a trustworthy

witness for all that he says; that plaintiff claims he was assaulted

by defendant whereas said John H. Gunn denies that the defendant

assaulted him and will testify that defendant did not assault

plaintiff; whereas it may be that the other co-defendant assaulted

plaintiff but he is in a better position; that plaintiff had well

expected to have said John H. Gunn present as a witness and that

he and a defendant he considered it was not necessary to subpoena

him and was surprised to find that he has been injured and cannot

attend the trial of this case."

...The following certificate of Dr. J. F. Fox was submitted

...the court in support of the motion: "Mr. John H. Gunn is at

present under my care. He is suffering from contusion and laceration

of the face and left shoulder."

We are of the opinion that the court did not err in denying

the defendant's motion for a continuance. We think the

doctor's certificate was insufficient. The certificate does not

state that Gunn's condition was such that he could not attend the

trial. Furthermore the court was not bound to grant a continuance

...the certificate of a physician. Reynolds v. Reynolds, 11 Ill.

...The affidavit of the attorney for the defendant was not

...It merely stated Gunn's condition as to his injuries.

...that Gunn should be allowed to go to his home.

...Reynolds v. Reynolds, 11 Ill. App. 37.

...Gunn's affidavit is defective in that it does not state

...that Gunn expects to prove by Gunn as true, or that he

...it is true. Reynolds v. Reynolds, 11 Ill. App. 37.

Lichtliter v. Russell, 89 Ill. App. 62, 64.

The pertinent part of the instruction complained of by counsel for the defendant Zech, is as follows: "If you believe from the evidence that the defendants, or either of them assaulted, or beat the plaintiff and the plaintiff sustained damages, you should find a verdict in favor of the plaintiff."

The contention of counsel for the defendant Zech is that the jury were misled by the instruction into finding Zech jointly liable with Oman; that "there is no other hypothesis upon which such a verdict could have been returned except they were told as in that instruction that this plaintiff in error was jointly liable."

The instruction did not tell the jury to find the defendants guilty. The jury were told to find in favor of the plaintiff. We do not think that the jury reasonably could have interpreted the instruction as directing them to find both defendants guilty if the evidence showed that only one was guilty.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

10-11-1934, 10-11-1934, 10-11-1934, 10-11-1934.

The pertinent part of the instruction submitted by the
counsel for the defendant each is as follows: "If you believe
from the evidence that the defendant, or either of them conspired,
on part the plaintiff and the plaintiff sustained damages, you
should find a verdict in favor of the plaintiff."
The contention of counsel for the defendant each is that
the jury were misled by the instruction in finding each jointly
liable with them; that "there is no other hypothesis upon which
such a verdict could have been returned except they were held as
in that instruction that this plaintiff in error was jointly liable."
The instruction did not tell the jury to find the
defendants guilty. The jury were told to find in favor of the
plaintiff. We do not think that the jury reasonably could have
interpreted the instruction as directing them to find both
defendants guilty if the evidence showed that only one was guilty.
Nor the reasons indicated the judgment of the trial
court is affirmed.

W. H. HARRIS.

10-11-1934, 10-11-1934, 10-11-1934, 10-11-1934.

ST. H.

CHARLES TIRRELL and ROBERT BRICKSON,
Doing Business under the Name and
Style of GARDEN SERVICE BUREAU,
Appellant,

vs.

ADMIRAL HOTEL COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

241 I.A. 617

MR. JUSTICE JONESTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago, brought by Charles Tirrell and Robert Brickson, doing business under the name of Garden Service Bureau, the plaintiffs, against the Admiral Hotel Company, a corporation, the defendant, to recover a balance of \$592.51, alleged to be due to the plaintiffs for landscape work done by the plaintiffs for the defendant.

It is the contention of the defendant that the plaintiffs have been paid in full.

The case was tried before the court without a jury. The court found in favor of the defendant and entered judgment on the finding. From the judgment the plaintiffs have prosecuted this appeal.

The plaintiffs, who were landscape architects, entered into a contract with the defendant, who was represented by John Hyden, its architect, to do certain landscape work for the defendant. The contract contained the following provision:

"It is understood that the general contractor will do all rough grading to the proper depth below the finished grade to allow for specified depth of black soil. The above estimate includes all labor and materials to do a first-class job in every respect."

The work of the plaintiffs was done under the direction of Erickson. While work was being done on the lawn area east of the hotel, Hyden stopped the work and told Erickson that the work was not being done right; that the grades were to be six inches lower in the center and higher at the ends, so that the area could be flooded for skating in the winter. Erickson testified that he was "pretty sure" that he mentioned to Hyden that this work would be charged for as extras. But Erickson did not testify that Hyden agreed that this work should be charged for as extras, or that Hyden said anything whatever in that respect. And the evidence does not show that Hyden made any such agreement, either with Erickson or Tirrell. On the contrary Erickson testified that Hyden said that this work was part of the contract. Erickson did the work in question in accordance with the directions of Hyden. The evidence shows that the cost of this work was \$592.51, the amount in controversy. Nothing further was said by any of the parties in regard to this work until the plaintiffs sent to the defendant a statement of the amount alleged to be due to the plaintiffs for the total work done, after a payment that the defendant had made on account had been deducted. The statement included items of cost for the work in controversy amounting to \$592.51. Erickson went to see Hyden to ask for payment. Erickson testified that Hyden crossed off the items composing the \$592.51, and said that he would not pay them as that work came within the contract. Erickson further testified: "I let him cross it out -- I figured that it was an extra and wouldn't go in with the waiver of lien." After crossing out the items in question Hyden gave Erickson a check for \$347.78. Erickson delivered the check to Tirrell who cashed it at Greenbaum Sons Bank and Trust Company on September 11, 1923. At the time the check was cashed Tirrell signed a waiver of lien and also the following document:

[illegible]

"Received of Greenbaum Sons Investment Company, the amount of the within order, and in consideration of said payment, the undersigned, who is the contractor for all landscape work, material and labor on the building mentioned in said order, hereby states that the actual amount of the contract for said material and labor is \$2197.73, without rebate to anyone, and the undersigned agrees promptly to complete said contract according to plans and specifications submitted to Greenbaum Sons Investment Company, and waives all right of lien on said building and premises for all material and labor furnished on and prior to this date, and agrees that as soon as the further sum of \$ none is tendered, to release and waive all right of lien which may hereafter accrue against said building and premises and to furnish waivers in full for all labor and material furnished during the construction of said building under said contract."

On September 12, 1923, the plaintiffs wrote the defendant the following letter:

"A careful inspection of the nursery stock which we planted on your property has been made, and we find that there are 38 shrubs, 3 Trees and 1 Vine dead or unsatisfactory to us. A replace order has been made and in accordance with our guarantee, these plants will be put in during the coming planting season. If you wish to make an additional order for Trees, Shrubs, Vines or Perennials, or have any other landscape work done, we shall be glad to call at once and make an estimate. We wish to thank you for the work you have given us and trust that we may renew our pleasant business relations."

Subsequently (the date is not shown) the plaintiffs sent a bill to the defendant for the \$592.51 and requested payment. On December 1, 1923, the defendant wrote the plaintiffs in reply as follows:

"We acknowledge receipt of your bill for \$592.51. The item of rough grading was included under the contract which has been paid in full. Please correct your books accordingly."

Counsel for the plaintiffs contend that the defendant has not proved payment; that "the evidence introduced by the defendant was in support of an alleged accord and satisfaction;" that the defense of accord and satisfaction cannot be relied on by the defendant, as that defense was not pleaded by the defendant; and that furthermore the evidence does not show an accord and satisfaction.

Although counsel for the plaintiffs contend that the defendant is relying on the defense of accord and satisfaction, counsel for the defendant do not discuss the question of accord and satisfaction in their brief, but maintain that "all of the evidence

For all labor and material furnished during the building under said contract.

— 100 —

4. *What is the purpose of the study?*

For the work you have given me and trust that we may be well of once and have no estimate. We wish to determine, or have any other language work done, we will be glad to make an additional order for two, three, or four more. It will be our pleasure to have the printing done.

THE UNIVERSITY OF CHICAGO PRESS

On December 14, 1968, the following letter was received by the FBI:

[Redacted]

The above information was obtained from the files of the FBI.

Sincerely,
[Redacted]

Enclosure

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

[illegible]

introduced by the defendant was admissible under its affidavit of merits as tending to establish payment."

We are of the opinion that the evidence clearly shows that the plaintiffs accepted the defendant's checks for \$347.78 as the final amount due to the plaintiffs on the account between the plaintiffs and the defendant.

In our view the question of accord and satisfaction does not arise on the evidence as we do not think the payment of the \$347.78 was made in settlement of a dispute between the plaintiffs and the defendant in regard to the amount due to the plaintiffs. Erickson accepted the check from Hyden for \$347.78 without any protest whatever after Hyden had crossed out the items in the bill relating to the work in question. The check was cashed and receipted for by Tirrell without any complaint. Thereafter a letter was written by the plaintiffs to the defendant indicating by its friendly tone apparently that the plaintiffs were satisfied with the amount of the check. As far as the record shows the first intimation that the defendant had that the check had not been accepted by the plaintiffs as final payment was when the bill of the plaintiffs for \$592.51 was sent to the defendant.

Furthermore, we do not think that the plaintiffs were in a position to claim payment for the work in question. The work was done by Erickson according to Hyden's directions after Hyden had told Erickson that the work was included in the contract. It is true that Erickson testified that he was "pretty sure" that he told Hyden that the cost of the work would be charged as extras; but even if he told Hyden that, nevertheless Erickson did the work knowing that Hyden had not agreed that the cost of the work should be charged for as extras. Consequently the plaintiffs, through

[illegible]

On the 1st of January 1955, the following was received from the Ministry of Health, London:

to turning 60 under the age of 65 and before the date of death

the 1980's and the 1990's. The 1980's was a period of rapid growth and the 1990's was a period of slow growth. The 1980's was a period of rapid growth and the 1990's was a period of slow growth.

THE UNIVERSITY OF CHICAGO

over a thousand, and the number of the people who were

There are also some other things that are not mentioned in the report, but which are of interest to the Commission. These are the results of the investigation of the case of the missing person, who was reported missing in 1964. The investigation was carried out by the Commission and the results are as follows:

...the fact that the ...

the fact that the Commission is not a body of experts in the field of human rights, but a body of experts in the field of international law. The Commission is not a body of experts in the field of human rights, but a body of experts in the field of international law. The Commission is not a body of experts in the field of human rights, but a body of experts in the field of international law.

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From 1971 to 1973, the number of people who had been in the United States for less than five years increased from 1.1 million to 1.5 million.

for the purpose of the present study, the following data were obtained:

the act of Erickson, waived the right, if any, under the contract to claim that the work was extra work not covered by the contract.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, F. J., and McSweeney, J., concur.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. WILLIAM E. FRANKENSTEIN,
Appellant,

vs.

CITY OF CHICAGO, a Municipal
Corporation, and FRANK E. DOHERTY,
Commissioner of Buildings of the
City of Chicago,
Appellees.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

241 I.A. 618

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action of mandamus, brought by William E. Frankenstein, the petitioner, against the City of Chicago and Frank E. Doherty, Commissioner of Buildings of the City of Chicago, the defendants, to compel the defendants to withdraw the revocation of a building permit granted to the petitioner to erect a garage, and to issue a new permit allowing the petitioner to erect the garage.

The cause was heard by the court without a jury on a stipulation of facts. The court denied the prayer of the petitioner, and from the order of the court the petitioner has prosecuted this appeal.

The stipulation of facts is as follows:

"It was stipulated by counsel for both parties that the following facts be considered as evidence appearing on the trial of the above entitled cause, as follows: That the plat hereto attached, marked Exhibit 1, correctly sets forth the location of the proposed garage at 3401-3411, both inclusive, Cottage Grove avenue, Chicago, Illinois, and the surrounding territory, particularly both sides of Cottage Grove avenue, from 34th street to 35th street; that the plat hereto attached marked Exhibit 2 correctly sets forth that portion known as 'Woodland Park' of the subdivision in which the premises in question fall; that exclusive of the buildings fronting on both sides of Woodland Park, marked 'Woodland Park Private' on Exhibit 1, there are six buildings on the west side of Cottage Grove avenue from 34th street to 35th street, none of which are used exclusively for residence purposes; that there are three buildings on the east side of Cottage Grove avenue between the premises of the petitioner and 35th street, none of which are used exclusively for residence purposes; that there are twenty-six buildings in the territory shown as Woodland Park Private on Exhibit 1, all of which are used exclusively

UNITED STATES OF AMERICA
V.
JOHN EDGAR HOOVER

CHARGE: OBSCENE EXPOSITION
COUNT OF BOOK COUNTY

UNITED STATES OF AMERICA
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JOHN EDGAR HOOVER

100-4-20

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA
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UNITED STATES OF AMERICA
V.
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UNITED STATES OF AMERICA

UNITED STATES OF AMERICA
V.
JOHN EDGAR HOOVER

for residence purposes; that there are three buildings on the east side of Cottage Grove avenue between 33rd street and the premises of the petitioner, none of which are used exclusively for residence purposes; that there are eight buildings on the west side of Cottage Grove avenue between 32nd street and 3rd place, none of which are used exclusively for residence purposes; that there are no buildings on the west side of Cottage Grove avenue between 33rd place and 34th street; that 33rd street runs in an easterly and westerly direction and intersects Cottage Grove avenue; that 33rd place runs in an easterly and westerly direction between Rhodes avenue on the west and Cottage Grove avenue on the east and does not intersect Cottage Grove avenue; that 34th street runs in an easterly and westerly direction, commencing at Cottage Grove avenue and runs thence west and does not intersect Cottage Grove avenue; that 34th place runs in an easterly and westerly direction commencing at Cottage Grove avenue and running thence west, and does not intersect Cottage Grove avenue; that 35th street runs in an easterly and westerly direction and intersects Cottage Grove avenue; that the premises of the petitioner, commonly known as 3401-3411, both inclusive, Cottage Grove avenue, front on Cottage Grove avenue; that Cottage Grove avenue is a street running in a northwesterly and southeasterly direction and has two street car tracks; that the defendants contend that Woodland Park, marked 'Woodland Park Private' on Exhibit 1, is a street in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes and that the premises of the petitioner are within 100 feet of such street, within the meaning of Section 246, Article 2, Chapter 11, of the ordinance passed by the City Council of the City of Chicago, and that by reason thereof the building permit and renewal thereof set forth in the amended petition herein were revoked as set forth and alleged in said amended petition; that said Section 246 of the ordinance was on October 20, 1923, in full force and effect and has been from that day until the present time a valid ordinance of the city."

Article 2, Section 246, Chapter 11, of the ordinances of the City of Chicago, is as follows:

"Location and Frontage Consents. No person, firm or corporation shall locate, build, construct or maintain any public garage within two hundred feet of any building used as and for a hospital, church or public or parochial school or the grounds thereof, nor shall any person, firm or corporation locate, build, construct or maintain any public garage in the city on any lot in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street; provided, that all lots which abut only on a public alley or court shall be considered as fronting on the street to which such alley or court leads. Such written consents shall be obtained and filed with the Commissioner of Buildings before a permit is issued for the construction of any such building or before a license is issued for the operation of any public garage in any existing building; provided, that in determining whether two-thirds of the buildings on both sides of such street are used exclusively for residence purposes any

building fronting on another street and located upon a corner lot shall not be considered, and provided, further that the word 'block' as used in this section, shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets."

It is admitted by the defendants that the proposed garage will not be located within 200 feet of a hospital, church, or school; and it is admitted by the petitioner that he did not procure the written consent of a majority of the property owners according to the frontage on both sides of the street.

The only questions to be determined, therefore, are whether the petitioner has proved that the lot on which the garage is to be built is not located in a block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, and is not within 100 feet of any such street.

In our opinion the petitioner has failed to make such proof. The stipulation of facts, when considered in connection with Exhibit 1, shows that Thirty-fourth street is the nearest street on the south to the petitioner's lot, but the stipulation of facts and Exhibit 1 do not show what street is the nearest street on the north to the petitioner's lot. In the absence of such proof the block, as defined in the ordinance, has not been fixed; and we are unable, therefore, to determine whether less than two-thirds of the buildings on both sides of Cottage Grove avenue in the block in which the petitioner's lot is located, are used exclusively for residence purposes.

Counsel for the petitioner contends that the stipulation of facts shows that Thirty-third street is the north boundary of the block. We do not think that this contention is correct. Furthermore, Thirty-third street is not indicated on Exhibit 1.

We further are of the opinion that it appears from

[illegible]

THE ONLY REASON FOR THE DELAY IN THE
ISSUANCE OF THE DECISION WAS THAT THE
COMMISSIONER OF THE BUREAU OF LANDS
HAD NOT YET RECEIVED THE NECESSARY
INFORMATION FROM THE BUREAU OF
THE INTERIOR.

THE NEW ENGLAND FREE-TRADING SOCIETY. (LATER IN THE YEAR 1846.)

It is a very common mistake to suppose that the only way to get a good result is to get a good man. This is not true. A good man may be a very poor manager, and a poor man may be a very good manager. The key is to get a good system, and then to get a good man to run it.

the stipulation of Facts and Exhibit 1 that the lot on which the proposed garage is to be located is within 60 feet of Thirty-fourth street.

In the view we have taken of the case it is not necessary to decide the question whether the buildings facing on Woodland Park should be considered as fronting on Cottage Grove avenue.

Counsel for the petitioner contends that the City of Chicago is estopped from revoking the building permit which it had granted to the petitioner.

In his petition the petitioner alleged that, relying on the approval of plans for the garage by the Building Commissioner and the issuance of the building permit, the petitioner entered into various contracts by which he incurred an expense to his damage of \$5,000. The defendants in their plea averred that the building permit was revoked "because the garage being erected upon the premises known and described as 3401-3411, inclusive, Cottage Grove avenue, in the City of Chicago, was being erected on a lot in a block in which two-thirds of the buildings on both sides of the street are used exclusively for resident purposes and within 100 feet of such a street in such a block without the written consent of a majority of the property owners according to frontage on both sides of the street." The defendants further alleged that Section 444 of the general ordinances of the City of Chicago provides as follows:

"If the work in, upon or about any building or structure shall be conducted in violation of any of the provisions of this chapter, it shall be the duty of the commissioner of buildings to revoke the permit for the building or wrecking operations in connection with which such violation shall have taken place. It shall be unlawful, after the revocation of such permit, to proceed with such building or wrecking operations unless such permit shall first have been reinstated or renewed by the commissioner of buildings. Before a permit so revoked may be lawfully reissued or reinstated, the entire

Don't let your car sit so long that you have to start it up.

building and building site shall first be put into condition corresponding with the requirements of this chapter, and any work or material applied to the same in violation of any of the provisions of this chapter shall be first removed from such building."

On the record in the case at bar we are of the opinion that the building permit issued to the petitioner was invalid; that the defendants had a lawful right to revoke it; and that the defendants are not estopped to deny the validity of the permit. Burton v. City of Chicago, 236 Ill. 323, 391; King v. City of Chicago et al., 133 Ill. App. 215, 220.

For the reasons stated the order of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McCurely, J., concur.

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is a fact.

and that the Government of the United States has the right to put it into circulation of any kind

RICHARD C. MAZER,
Plaintiff in Error,

vs.

PETER DOM,
Defendant in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

241 I.A. 618

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Richard C. Mazer, the plaintiff, from a judgment on a verdict which the court directed the jury to find in favor of the defendant, Peter Dom. The action was brought by the plaintiff to recover damages for injuries alleged to have been received by the plaintiff through the negligence of the defendant in a collision between the automobiles of the plaintiff and the defendant.

The only question to be determined is whether the court committed reversible error in peremptorily instructing the jury to find for the defendant.

According to the well established rule, such an instruction should be given only when there is no evidence which fairly tends to prove all of the material allegations in the declaration. Libby, McNeill & Libby v. Cook, 222 Ill. 206, 213. If there is any evidence from which, if it stood alone, the jury reasonably could find that all of the material averments of the declaration have been proved, then the cause should be submitted to the jury. Libby, McNeill & Libby v. Cook, *supra*, (p. 212); Kelly v. Chicago City Ry. Company, 283 Ill., 640, 642.

In the case at bar the principal contentions of counsel for the defendant are that there is no evidence which fairly tends to support the allegation in the declaration that the plaintiff was in the exercise of due care and caution for his own safety; that on

PERSON TO CIRCUIT COURT OF
COOK COUNTY.

241 I.A. 618

THE PEOPLE OF THE STATE OF ILLINOIS,
COUNTY OF COOK,
vs.
JAMES M. ...

IN FURTHER Pursuant to the Order of the Court,

This is to certify that the following is the

Verdict of the Jury in the above entitled case:

The jury find in favor of the defendant, Peter ...

and by the plaintiff to recover damages for injuries alleged.

It has been received by the plaintiff through the negligence of

the defendant is a collision between the automobile of the

plaintiff and the defendant.

The only question to be determined is whether the court

committed reversible error in temporarily instructing the jury to

find for the defendant.

According to the well established rule, such an instruction

is reversible error only when there is no evidence in the case

to prove all of the material allegations in the declaration. Libby.

Libby v. Cook, 222 Ill. 200, 213. If there is any evidence

to prove all of the material allegations in the declaration, the court

when the cause should be submitted to the jury. Libby v. Cook.

Libby v. Cook, supra, (7-212); Libby v. Cook, supra.

222 Ill. 200, 213.

In the case at bar the principal contention of counsel

for the defendant was that there is no evidence in the case

to support the allegation in the declaration that the plaintiff was

the exercise of due care and caution for his own safety; that on

the contrary the evidence shows, as a matter of law, that the plaintiff was guilty of contributory negligence. Counsel for the defendant also contend that the evidence does not show that the defendant was guilty of negligence; but this contention is not argued at any length, and we are clearly of the opinion that the evidence does not show, as a matter of law, that the defendant was not guilty of negligence.

In examining the evidence to determine the question whether, as a matter of law, the plaintiff was guilty of contributory negligence, since the question arises on a motion to direct a verdict for the defendant, the most favorable evidence for the plaintiff must be accepted as true. Wallgren Express Company v. King, 291 Ill., 472, 475. A motion to direct a verdict is in the nature of a demurrer to the evidence. McCune v. Reynolds, 289 Ill. 183, 190. All contradictory evidence must be rejected. Yess v. Yess, 235 Ill., 414, 418.

In considering the proposition when contributory negligence is a question of fact and when it is a question of law, the Supreme court said in the case of Kelly v. Chicago City Ry. Company, 283 Ill. 640 (p. 645):

"The question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence. (Bale v. Chicago Junction Ry. Company, 259 Ill. 476), but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation, that the court can say, as a matter of law, that no rational person would have acted as he did, and render judgment for the defendant."

In the case at bar was the plaintiff "so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation, that the court could say, as a matter of law, that no rational person would have acted" as the plaintiff did?

The pertinent facts are as follows: The accident oc-

the contrary the evidence shows, as a matter of law, that the plaintiff was guilty of contributory negligence. Counsel for the defendant also contend that the evidence does not show that the defendant was guilty of negligence; but this contention is not argued as any length, and we are clearly of the opinion that the evidence does not show, as a matter of law, that the defendant was not guilty of negligence.

In examining the evidence to determine the question whether, as a matter of law, the plaintiff was guilty of contributory negligence, since the question arises on a motion to direct a verdict for the defendant, the most favorable evidence for the plaintiff must be accepted as true. Wallington Express Company v. City of New York, 231 Ill. 473, 475. A motion to direct a verdict is in the nature of a demurrer to the evidence. McQuinn v. Reynolds, 238 Ill. 401, 405. All contradictory evidence must be rejected. Yess v. City of New York, 238 Ill. 414, 415.

In considering the proposition when contributory negligence is a question of fact and when it is a question of law, the court said in the case of Wallington Express Company v. City of New York, 231 Ill. 473, 475 (p. 445):

"The question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence. Wallington Express Company v. City of New York, 231 Ill. 473, 475. But where the facts are such that a person is so careless or his conduct so violative of all rational standards of conduct as to be conclusively negligent in a like situation, that the court can say, as a matter of law, that no rational person would have acted as he did, and render judgment for the defendant."

In the case at bar was the plaintiff "so careless or his conduct so violative of all rational standards of conduct as to be conclusively negligent in a like situation, that the court can say, as a matter of law, that no rational person would have acted as he did, and render judgment for the defendant?"

The pertinent facts are as follows: The accident occurred

curred at the intersection of Sheridan Road and Thorndale avenue, thoroughfares in the city of Chicago, in the morning between five and five thirty o'clock. It was dark at that hour. Daylight was just beginning to break. Sheridan Road runs north and south and Thorndale avenue east and west. The plaintiff was driving north on Sheridan Road and the defendant was driving south on Sheridan Road. When the plaintiff reached the intersection of Sheridan Road and Thorndale avenue he saw an automobile on Sheridan Road about half way up the block, coming south on Sheridan Road. This automobile was not the one that struck the plaintiff's automobile. When the plaintiff saw this automobile he turned his automobile just enough to indicate that he was going to turn west into Thorndale avenue. The plaintiff stopped, blew his horn and listened. The other automobile stopped right up in front of the plaintiff's automobile. When the other automobile stopped the plaintiff started to turn west into Thorndale avenue, going at the rate of three or four miles an hour; and the other automobile started back of the plaintiff to the plaintiff's right, the plaintiff passing in front of the other automobile to the left of it. This other automobile at the time of the collision of the automobiles of the plaintiff and the defendant was north of the plaintiff's automobile. When the plaintiff reached the sidewalk line where Sheridan Road and Thorndale avenue intersect, the defendant's automobile came along "like a flash" and struck the plaintiff's automobile on the front seat on the right-hand side, knocking the plaintiff's automobile from about the middle of Thorndale avenue over to the south curb of Thorndale avenue, approximately ten or twelve feet. After the collision the plaintiff's automobile was on Thorndale avenue about fifteen or twenty-five feet from the intersection of Thorndale avenue and Sheridan Road on the south side of the curb of Thorndale avenue. The plaintiff's automobile was "all broke" and had to be repaired.

occurred at the intersection of Sheridan Road and Thorndale Avenue, thereabouts in the city of Chicago, in the morning between five and five thirty o'clock. It was dark at that hour. Daylight was just beginning to break. Sheridan Road runs north and south and Thorndale Avenue east and west. The plaintiff was driving north on Sheridan Road and the defendant was driving south on Sheridan Road. When the plaintiff reached the intersection of Sheridan Road and Thorndale Avenue he saw an automobile on Sheridan Road about half way up the block, coming south on Sheridan Road. This automobile was not the one that struck the plaintiff's automobile. When the plaintiff saw this automobile he turned his automobile just enough to indicate that he was going to turn west into Thorndale Avenue. The plaintiff stopped, blew his horn and listened. The other automobile stopped right up in front of the plaintiff's automobile. When the other automobile stopped the plaintiff started to turn west into Thorndale Avenue. Going at the rate of three or four miles an hour, and the other automobile started back of the plaintiff to the plaintiff's right, the plaintiff passing in front of the other automobile to the left of it. This other automobile at the time of the collision of the automobiles of the plaintiff and the defendant was north of the plaintiff's automobile. When the plaintiff reached the at-grade line where Sheridan Road and Thorndale Avenue intersect, the defendant's automobile came along "like a train" and struck the plaintiff's automobile on the front seat on the right-hand side, knocking the plaintiff's automobile from about the middle of Thorndale Avenue over to the south curb of Thorndale Avenue, approximately ten or twelve feet. After the collision the plaintiff's automobile was on Thorndale Avenue about fifteen or twenty-five feet from the intersection of Thorndale Avenue and Sheridan Road on the north side of the curb of Thorndale Avenue. The plaintiff's automobile was "all broke" and had to be repaired.

The plaintiff did not see the defendant's automobile until it struck plaintiff's automobile. Thorndale avenue is about 24 feet wide and Sheridan Road is wide enough for three automobiles to be driven abreast of each other "on each side of Sheridan Road." The locality is a residence district. It is a closely built up residence district "on the west side;" on the east side of Thorndale avenue there were no houses. When the collision occurred the defendant was driving at the rate of twenty to twenty-five miles an hour. The lights on both the defendant's automobile and the plaintiff's automobile were lighted. The defendant first saw the plaintiff's automobile when it was about a half a block away. The defendant saw the plaintiff turning his automobile when it was about twenty-five feet from the defendant's automobile.

We are clearly of the opinion that on the evidence which we have stated above, it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence. Or expressing our conclusion in the language of the court in the case of Kelly v. City of Chicago, supra, we do not think that the evidence shows that the plaintiff was so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation, that we can say, as a matter of law, that no rational person would have acted as the plaintiff did.

Counsel for the defendant contend that under the Motor Vehicle act (presumably section 33 of that act) the defendant had the right-of-way; that it was the duty of the plaintiff to observe the approaching automobile of the defendant or to use reasonable care to see it; that the plaintiff in the exercise of due care would or should have seen that unless he yielded the right-of-way, the defendant's automobile would hit his automobile; that the evidence fails to show where the defendant's automobile was when the plaintiff attempted to turn, and that consequently it cannot be

The plaintiff did not see the defendant's automobile until it struck
plaintiff's automobile. Thoroughfare avenue is about 24 feet wide and
Thurston Road is wide enough for three automobiles to be driven
across of each other "on each side of Thurston Road." The locality
is a residential district. It is a closely built up residential dis-
trict "on the west side;" on the east side of Thoroughfare avenue
there were no houses. When the collision occurred the defendant was
driving at the rate of twenty to twenty-five miles an hour. The
lights on both the defendant's automobile and the plaintiff's au-
tomobile were lighted. The defendant first saw the plaintiff's au-
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feet from the defendant's automobile.

We are clearly of the opinion on that on the evidence
which we have stated above, it cannot be said, as a matter of law,
that the plaintiff was guilty of contributory negligence. On ex-
isting and existing in the evidence. It is not the duty of the
jury to say that the plaintiff was so careless or his conduct so violative
of all rational standards of conduct applicable to persons in a like
situation, that we can say, as a matter of law, that no rational
person would have acted as the plaintiff did.

Counsel for the defendant contends that under the Motor
Vehicle act (presumably section 38 of that act) the defendant had
the right-of-way; that it was the duty of the plaintiff to observe
the approaching automobile of the defendant or to use reasonable
care to see it; that the plaintiff in the exercise of due care
did not see it; that the plaintiff was negligent; that the
defendant was not negligent; that the plaintiff's negligence was the
cause of the accident; and that consequently it cannot be
said that the plaintiff was guilty of contributory negligence.

determined whether or not in the circumstances the plaintiff had a right to proceed. In support of their contention in regard to the right-of-way counsel for the defendant cite the cases of McCarthy v. Fadin, 1st District Appellate Court, No. 29585, not yet reported, and Partridge v. Eberstein, 225 Ill. App. 209, both of which cases construe section 33 of the Motor Vehicle act.

In our opinion the question of the right-of-way under section 33 of the Motor Vehicle act does not arise in the case at bar, for the reason that the defendant's automobile and the plaintiff's automobile were approaching each other on Sheridan Road, and section 33 provides that "All vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left." In the case of McCarthy v. Fadin, *supra*, the accident occurred at the intersection of Balmoral avenue and Glenwood avenue, Balmoral avenue being an east and west street and Glenwood avenue being a north and south street. The plaintiff was driving west on Balmoral avenue and the defendant was driving north on Glenwood avenue. In the case of Partridge v. Eberstein, *supra*, the accident occurred at the intersection of Luella avenue, a north and south street, and 76th street, an east and west street. The plaintiff was driving west on 76th street, and the defendant was driving south on Luella avenue.

We disagree with the contention of counsel for the defendant that the plaintiff was required, as a condition precedent to his right to recover, that he should show by the evidence where the defendant's automobile was when he, the plaintiff, attempted to turn into Thorndale avenue. According to the evidence, the plaintiff did not see the defendant's automobile before it struck the plaintiff's automobile. In this state of the evidence the question

determined whether or not in the circumstances the plaintiff had a right to proceed. In support of their contention in regard to the right-of-way counsel for the defendant cite the cases of McCarthy v. Kadin, 1st District Appellate Court, No. 29585, not yet reported, and Karlitzke v. Spierstein, 225 Ill. App. 304, of which cases constructive section 35 of the Motor Vehicle Act.

In our opinion the question of the right-of-way under section 35 of the Motor Vehicle Act does not arise in the case at bar, for the reason that the defendant's automobile and the plaintiff's automobile were approaching each other on Division Street, and section 35 provides that "All vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching from the right, and shall have the right-of-way over those approaching from the left." In the case of McCarthy v. Kadin, supra, the accident occurred at the intersection of Belmont Avenue and Glenwood Avenue, Belmont Avenue being an east and west street and Glenwood Avenue being a north and south street. The plaintiff was driving west on Belmont Avenue and the defendant was driving north on Glenwood Avenue. In the case of Karlitzke v. Spierstein, supra, the accident occurred at the intersection of DuSable Avenue, a north and south street, and 78th Street, an east and west street. The plaintiff was driving west on 78th Street, and the defendant was driving south on DuSable Avenue.

We disagree with the contention of counsel for the defendant that the plaintiff was required, as a condition precedent to his right to recover, that he should show by the evidence that the defendant's automobile was then on the plaintiff's automobile's turn into Throntale Avenue. According to the evidence, the plaintiff did not see the defendant's automobile before it struck the plaintiff's automobile. In this state of the evidence the question

was whether in the circumstances the plaintiff exercised reasonable care to see the defendant's automobile. On that question we do not think that it can be said, as a matter of law, that the plaintiff failed to exercise reasonable care to see the defendant's automobile.

Counsel for the defendant further argue as follows:

If the plaintiff "had not sufficient space to look after his view was obstructed, he should have waited until the car obstructing his view had moved, and in any event he was not in the exercise of ordinary care, when without knowing what he might be approaching he drove into the pathway of the defendant's car without having any reason to presume and no fact on which to presume that no car was approaching from the north."

In our view the argument of counsel for the defendant presents questions of fact for the jury and not questions of law for the court. The rule by which a question of fact may be distinguished from a question of law, is that if the facts are conceded or if there is no dispute as to the facts and all reasonable persons will agree from the evidence on the legitimate conclusions to be drawn from the evidence, then the question becomes one of law and not of fact. Sturm v. Consolidated Coal Company, 248 Ill., 20, 28. If there may be a difference of opinion about the conclusions to be drawn from the evidence so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. Heidenreich v. Brenner, 260 Ill., 439, 452. In the case at bar we think that reasonable minds may differ on the question whether the plaintiff was guilty of contributory negligence.

Counsel for the plaintiff contend that the court erred in allowing the trial attorney for the defendant to cross examine the defendant about matters not covered on the direct examination of the defendant. The defendant was called as a witness on behalf of the plaintiff and questioned only as to the rate of speed at which he was driving. The trial attorney for the defendant on cross-

[illegible][illegible]

It was pointed out that the "new" view of the world was not a new view of the world, but a new view of the world.

It is not known whether or not he was in the vicinity of the scene of the crime at the time of the shooting.

He drove into the gateway of the defendant's car without having

1. The first of these is the fact that the system is not a simple one, and that it is not a simple one.

SECRET

Information from a knowledge base that is used to explain a diagnosis

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

There are two main types of *in situ* hybridization: *fluorescent in situ hybridization* (FISH) and *immunohistochemistry* (IHC). FISH uses fluorescently labeled probes to detect specific DNA or RNA sequences in cells or tissues. IHC uses antibodies to detect specific proteins in cells or tissues.

RECORDED & INDEXED IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

...consequently prohibited to giving new titles to

Commander for the plaintiff's counsel that the court should
allowing the trial attorney for the defendant to cross examine

10. The following is a list of the names of the persons who were present at the meeting held on the 10th day of May, 1968, at the residence of the subject, at the address of 1000 North 10th Street, Los Angeles, California.

Order to change to other and at as value household has Tithable and

was whether in the circumstances the plaintiff exercised reasonable care to see the defendant's automobile. On that question we do not think that it can be said, as a matter of law, that the plaintiff failed to exercise reasonable care to see the defendant's automobile.

Counsel for the defendant further argue as follows:

If the plaintiff "had not sufficient space to look after his view was obstructed his view had moved, and in any event he was not in the exercise of ordinary care, when without knowing what he might be approaching he drove into the pathway of the defendant's car without having any reason to presume and no fact on which to presume that no car^{was} approaching from the north."

In our view the argument of counsel for the defendant presents questions of fact for the jury and not questions of law for the court. The rule by which a question of fact may be distinguished from a question of law, is that if the facts are conceded or if there is no dispute as to the facts and all reasonable persons will agree from the evidence on the legitimate conclusions to be drawn from the evidence, then the question becomes one of law and not of fact. Sturm v. Consolidated Coal Company, 248 Ill., 20, 28. If there may be a difference of opinion about the conclusions to be drawn from the evidence so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. Heitenreich v. Bremer, 260 Ill., 439, 452. In the case at bar we think that reasonable minds may differ on the question whether the plaintiff was guilty of contributory negligence.

Counsel for the plaintiff contend that the court erred in allowing the trial attorney for the defendant to cross examine the defendant about matters not covered on the direct examination of the defendant. The defendant was called as a witness on behalf of the plaintiff and questioned only as to the rate of speed at which he was driving. The trial attorney for the defendant on cross-

was whether in the circumstances the plaintiff exercised reasonable care to see the defendant's automobile. On that question we do not think that it can be said, as a matter of law, that the plaintiff failed to exercise reasonable care to see the defendant's automobile. Counsel for the defendant further argues as follows:

It the plaintiff "had not sufficient space to look after his view was obstructed his view had moved, and in any event he was not in the exercise of ordinary care, when without knowing what he might be approaching he drove into the gateway of the defendant's yard without having any reason to presume and no fact on which to presume that no car was approaching from the north."

In our view the argument of counsel for the defendant presents questions of fact for the jury and not questions of law for the court. The rule by which a question of fact may be distinguished from a question of law, is that if the facts are conceded or if there is no dispute as to the facts and all reasonable persons will agree from the evidence on the legitimate inferences to be drawn from the evidence, then the question becomes one of law and not of fact. Smith v. Commonwealth, 222 Ky. 501, 502. It may be a matter of opinion what inferences should be drawn from the facts and evidence as to the facts and evidence as to the facts and evidence, but it is a question of fact for the jury. Commonwealth v. Smith, 222 Ky. 501, 502. In the case at bar we think that reasonable minds will differ as to the question whether the plaintiff was guilty of contributory negligence.

Counsel for the plaintiff contends that the court erred in allowing the trial attorney for the defendant to cross examine the defendant about matters not covered on the direct examination of the defendant. The defendant was called as a witness on behalf of the plaintiff and questioned only as to the facts at issue at which he was driving. The trial attorney for the defendant on cross-

examination, over the plaintiff's objection was allowed by the court to examine the defendant at length concerning the accident. The trial attorney for the plaintiff was then permitted to cross examine the defendant. No witnesses were called on behalf of the defendant. The trial attorney for the defendant conceded on the trial that his examination of the defendant was not proper cross-examination; that in examining the defendant as he did, he intended only "to save time." In this state of the record the defendant should be considered as having testified in his own behalf; and the motion of the defendant to direct the verdict in favor of the defendant should be considered as having been made at the close of all of the evidence and not at the close of the plaintiff's evidence. But since the same rule applies to a motion to direct a verdict at the close of the plaintiff's evidence, as to a motion to direct a verdict at the close of all the evidence (Libby, McNeill & Libby v. Cook, *supra*, p. 212), the objection of counsel for the plaintiff is immaterial.

For the reasons indicated the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McCurely, J., concur.

examination, over the plaintiff's objection was allowed by the court to examine the defendant as I wish concerning the accident. The trial attorney for the plaintiff was then permitted to cross examine the defendant. He witnesses were called on behalf of the defendant. The trial attorney for the defendant conceded on the trial that his examination of the defendant was not proper cross-examination; that in examining the defendant as he did, he intended only "to bring out" the truth. In this state of the record the defendant should be allowed as having testified in his own behalf; and the motion of the defendant to direct the verdict in favor of the defendant should be considered as having been made at the close of all of the evidence and not at the close of the plaintiff's evidence. This since the same rule applies to a motion to direct a verdict at the close of the plaintiff's evidence, as to a motion to direct a verdict at the close of all the evidence (Light v. Smith & Light v. Smith & Light). The objection of counsel for the plaintiff is

But the reasons indicated the judgment of the trial

court is reversed and the cause remanded.

THURSDAY AND FRIDAY.

THURSDAY, JULY 17, 1896. (Continued)

THURSDAY, JULY 17, 1896. (Continued)

THURSDAY, JULY 17, 1896. (Continued)

THURSDAY, JULY 17, 1896. (Continued)

The trial record

THE MARSHAW, FULLER & GOODWIN COMPANY,
a Corporation,

Appellee,

vs.

LOUIS S. NEIMAN and ELIAS NEIMAN, Co-
partners, Doing Business under the
name of NEIMAN BROTHERS,

Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

241 I.A. 618

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis S. Neiman and Elias Neiman, partners, doing business under the name of Neiman Brothers, the defendants, from a judgment on a verdict for \$860.02 which the court directed the jury to find in favor of the plaintiff, The Marshaw, Fuller & Goodwin Company, a corporation. The plaintiff brought an action against the defendants to recover \$812.40 alleged to be due on a contract between the plaintiff and the defendants. The contract is as follows:

"Sold to Neiman Bros. 3100 Polk St., Chicago, Ill.

Article Prime Dutch Caraway seed

Buyer's consumptive requirements not to exceed by mutual consent, 100 bags, containing approximately 110# each.

With protection against decline on undelivered portion; that is, if during the life of this contract a lower price is named by competitors, seller is either to meet that price or allow buyer to purchase elsewhere while such reduction is in force; quantity so purchased to be written off the contract.

Price 30c per lb. G.F.N., ex-warehouse Chicago.

Terms 4% 7 days.

Delivery to be taken out as follows:

25 bags March 1, 1923,	25 Bags May 1, 1923,
25 " April 2, 1923,	25 " June 1, 1923.

Payable at Cleveland in current funds. If not otherwise specified, buyer is to furnish seller with shipping specifications covering substantially equal monthly quantities. Buyer's failure to furnish specifications as aforesaid, may, at seller's option, without notice to buyer, be treated and considered as a waiver on the part of the buyer, of all rights to demand subsequent delivery of the unspecified portion of the goods. Each delivery to stand as a separate sale; but if buyer fails to fulfill terms of payment under this or other contracts, seller may defer further shipments until payment is made, or may cancel this and other contracts, at his option. Delivery subject to all contingencies beyond the seller's control, whether occurring from matters affecting the seller's power to manufacture or deliver, or the receipt by him from those with whom seller has contracted for the delivery of material, from which the material to be furnished hereunder is to be supplied."

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

812 A. I. 122

DATE OF DEATH

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and this is all that is left of what was before.

223 m/s for 1000 s. The first 1000 s of the test was used to determine the initial temperature of the specimen. The temperature of the specimen was measured by a thermocouple (Type K, Omega Engineering, Inc., Stamford, CT) attached to the specimen. The temperature of the specimen was measured at the end of the test. The temperature of the specimen was measured at the end of the test. The temperature of the specimen was measured at the end of the test.

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1944-1945

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied. This is done by the investigator who is responsible for the study. The investigator must first identify the problem that is being studied.

1992

THE UNIVERSITY OF CHICAGO PRESS

It is the policy of the Department of the Interior to acquire and protect the natural resources of the United States for the benefit of the people. The Department is committed to the conservation of the natural resources of the United States and to the protection of the environment. The Department is also committed to the protection of the cultural resources of the United States. The Department is committed to the protection of the historic resources of the United States. The Department is committed to the protection of the archaeological resources of the United States. The Department is committed to the protection of the paleontological resources of the United States. The Department is committed to the protection of the geologic resources of the United States. The Department is committed to the protection of the mineral resources of the United States. The Department is committed to the protection of the energy resources of the United States. The Department is committed to the protection of the water resources of the United States. The Department is committed to the protection of the fish and wildlife resources of the United States. The Department is committed to the protection of the plant resources of the United States. The Department is committed to the protection of the soil resources of the United States. The Department is committed to the protection of the land resources of the United States. The Department is committed to the protection of the public lands of the United States. The Department is committed to the protection of the national parks of the United States. The Department is committed to the protection of the national monuments of the United States. The Department is committed to the protection of the national preserves of the United States. The Department is committed to the protection of the national forests of the United States. The Department is committed to the protection of the national wildlife refuges of the United States. The Department is committed to the protection of the national historic landmarks of the United States. The Department is committed to the protection of the national historic sites of the United States. The Department is committed to the protection of the national historic trails of the United States. The Department is committed to the protection of the national historic battlefields of the United States. The Department is committed to the protection of the national historic cemeteries of the United States. The Department is committed to the protection of the national historic houses of the United States. The Department is committed to the protection of the national historic ships of the United States. The Department is committed to the protection of the national historic aircraft of the United States. The Department is committed to the protection of the national historic automobiles of the United States. The Department is committed to the protection of the national historic motorcycles of the United States. The Department is committed to the protection of the national historic bicycles of the United States. The Department is committed to the protection of the national historic trains of the United States. The Department is committed to the protection of the national historic ships of the United States. The Department is committed to the protection of the national historic aircraft of the United States. The Department is committed to the protection of the national historic automobiles of the United States. The Department is committed to the protection of the national historic motorcycles of the United States. The Department is committed to the protection of the national historic bicycles of the United States. The Department is committed to the protection of the national historic trains of the United States.

at least you'd be sure to be safe and sound.

you can't, then it's not a good idea to do it.

... ..

THE UNIVERSITY OF CHICAGO

The claim of plaintiff is that on March 1, 1923, the plaintiff delivered to the defendants the 25 bags of caraway seed provided for in the contract, and that according to the terms of the contract the amount due for the caraway seed so delivered was \$812.40; that the defendants refused to pay for the caraway seed.

The defendants filed an affidavit of merits and a separate plea of set-off. In their affidavit of merits the defendants allege that "the defendants on February 27, 1923, notified the plaintiff that the price of caraway seed had fallen and that defendants were offered by plaintiff's competitors caraway seed at 27¢ per lb. and demanded to know if plaintiff would meet that price; that plaintiff advised defendants that it would meet the competitive price of 27¢ per lb., and would deliver the March shipment of 25 bags, with protection against decline on undelivered portion; that is, if during the life of this contract a lower price is named by competitors, seller is either to meet that price or allow buyer to purchase elsewhere while such reduction is in force; quantity so purchased to be written off the contract." The defendants further allege that the plaintiff refused to deliver the caraway seed provided for in the contract on April 2, 1923, May 1, 1923, and June 1, 1923; that thereupon the defendants bought the caraway seed in the open market; that the market price of caraway seed had advanced in price and that the defendants suffered a loss of \$460.36, which they were entitled to recoup from the plaintiff. In their set-off the defendants allege in substance that by reason of the fact that they were compelled to buy caraway seed in the open market at an advanced price, there is due the defendants the sum of \$382.87 after allowing the plaintiff credit for the sum of \$727.41, the amount which the defendants allege was due for the caraway seed delivered on March 1, 1923.

The claim of plaintiff is that on March 1, 1933, the plaintiff delivered to the defendant the 25 bags of sawney seed provided for in the contract, and that according to the terms of the contract the amount due for the sawney seed so delivered was \$480.36; that the defendant refused to pay for the sawney seed.

The defendant filed an affidavit of merits and a separate plea of non est. In their affidavit of merits the defendants allege that "the defendant on February 27, 1933, notified the plaintiff that the price of sawney seed had fallen and that defendant were offered by plaintiff's competitive sawney seed at 27 1/2 per lb., and demanded to know if plaintiff would meet that price; that plaintiff advised defendant that it would meet the competitive price of 27 1/2 per lb., and would deliver the March shipment of 25 bags, with protection against decline on undelivered portion; that is, it during the life of this contract a lower price is named by competitors, seller is at liberty to meet that price or allow buyer to purchase elsewhere with same protection as to price; that is, during the life of this contract." The defendant further allege that the plaintiff refused to deliver the sawney seed provided for in the contract on April 2, 1933, and on April 1, 1933, and that between the defendant and the plaintiff the sawney seed in the open market was at a price of 27 1/2 per lb. and that the market price of sawney seed had advanced in price and that the defendant suffered a loss of \$480.36, which they were entitled to recover from the plaintiff. In their non est the defendant allege in substance that by reason of the fact that they were compelled to buy sawney seed in the open market at an advanced price, there is no loss to the defendant and no recovery is due.

It is shown that the defendant on March 1, 1933, notified the plaintiff that the price of sawney seed had fallen and that defendant were offered by plaintiff's competitive sawney seed at 27 1/2 per lb., and demanded to know if plaintiff would meet that price; that plaintiff advised defendant that it would meet the competitive price of 27 1/2 per lb., and would deliver the March shipment of 25 bags, with protection against decline on undelivered portion; that is, it during the life of this contract a lower price is named by competitors, seller is at liberty to meet that price or allow buyer to purchase elsewhere with same protection as to price; that is, during the life of this contract." The defendant further allege that the plaintiff refused to deliver the sawney seed provided for in the contract on April 2, 1933, and on April 1, 1933, and that between the defendant and the plaintiff the sawney seed in the open market was at a price of 27 1/2 per lb. and that the market price of sawney seed had advanced in price and that the defendant suffered a loss of \$480.36, which they were entitled to recover from the plaintiff. In their non est the defendant allege in substance that by reason of the fact that they were compelled to buy sawney seed in the open market at an advanced price, there is no loss to the defendant and no recovery is due.

It is shown that the defendant on March 1, 1933, notified the plaintiff that the price of sawney seed had fallen and that defendant were offered by plaintiff's competitive sawney seed at 27 1/2 per lb., and demanded to know if plaintiff would meet that price; that plaintiff advised defendant that it would meet the competitive price of 27 1/2 per lb., and would deliver the March shipment of 25 bags, with protection against decline on undelivered portion; that is, it during the life of this contract a lower price is named by competitors, seller is at liberty to meet that price or allow buyer to purchase elsewhere with same protection as to price; that is, during the life of this contract." The defendant further allege that the plaintiff refused to deliver the sawney seed provided for in the contract on April 2, 1933, and on April 1, 1933, and that between the defendant and the plaintiff the sawney seed in the open market was at a price of 27 1/2 per lb. and that the market price of sawney seed had advanced in price and that the defendant suffered a loss of \$480.36, which they were entitled to recover from the plaintiff. In their non est the defendant allege in substance that by reason of the fact that they were compelled to buy sawney seed in the open market at an advanced price, there is no loss to the defendant and no recovery is due.

The plaintiff denied the allegations of the defendants and alleged that on March 24, 1923, the plaintiff cancelled the contract because of the refusal of the defendants "to make payments in accordance with the terms" of the contract for the caraway seed delivered to the defendants March 1, 1923.

Counsel for the plaintiff contend that the defendants' "alleged new agreement or oral modification of the original contract was within the statute of frauds and not enforceable," and that the damages claimed by the defendants in their set-off were unliquidated and did not arise out of the transaction on which the suit was brought, and therefore were not a proper matter of set-off.

In the view we take of the case it is not necessary to decide the questions raised by counsel for the plaintiff because of the fact that the evidence does not show that a "lower price" was "named by competitors" of the plaintiff before the delivery of the caraway seed on March 1, 1923. That being so, the plaintiff was entitled to be paid at the rate of thirty cents a pound and not twenty-seven cents a pound, as contended by the defendants; and the plaintiff was justified by the terms of the contract in cancelling, as it did, the contract on March 24, 1923.

According to the contract the plaintiff was required to meet a lower price named by competitors; and if the plaintiff failed to do so the defendants could "purchase elsewhere while such reduction" was "in force."

The only evidence relating to the question whether a lower price was named prior to the delivery of the caraway seed on March 1, 1923, is that of Louis G. Neiman, one of the defendants, and a letter to the plaintiff signed "Neiman Bros." The testimony of Louis G. Neiman in this respect, as shown by the transcript of the testimony, is as follows:

The plaintiff denied the allegations of the defendant and alleged that on March 24, 1933, the plaintiff executed the contract because of the refusal of the defendant to make payments in full, and the terms of the contract for the railway road delivered to the plaintiff on March 1, 1933.

Counsel for the plaintiff contended that the defendant alleged new agreement or oral modification of the original contract was within the scope of the contract and not enforceable, and that the damages claimed by the defendant in their suit were unjustified and did not arise out of the transaction on which the suit was brought, and therefore were not a proper matter of recovery.

In the view we take of the case it is not necessary to raise the questions raised by counsel for the plaintiff because of the fact that the evidence does not show that a "lower price" was "paid by competitors" at the plaintiff's delivery of the railway road on March 1, 1933. That being so, the plaintiff was entitled to be paid at the rate of thirty cents a pound and not twenty-five cents a pound, as contended by the defendant; and the plaintiff was entitled by the terms of the contract in cancelling, as it did, the contract on March 24, 1933.

According to the contract the plaintiff was required to sell a lower price named by competitors; and if the plaintiff failed to do so the defendant could "purchase elsewhere while such reduction was in force."

The only evidence relating to the question whether a lower price was named prior to the delivery of the railway road on March 1, 1933, is that of Lewis W. Nelson, one of the defendants, who testified that the plaintiff signed "Nelson Bros." The testimony of Lewis W. Nelson is that he was not present at the time the railway road was delivered to the plaintiff, and that he did not see the contract or the railway road.

"Q. After this contract was signed, did you call or have any conversation over the telephone with Mr. Eager? (the manager of the Chicago office of the plaintiff).

"A. Yes, on the 27th day of February. (1923).

"Q. Just tell what was said by either one of you.

"A. I called up Mr. Eager and told him that the market on caraway seed came down to twenty-seven cents and under the contract I was entitled to the market price prevailing at the time. He said, 'I will call you back.' He called me back and said, 'All right, we will meet that price.'"

It will be observed that only the market price was referred to, and not the price of a competitor of the plaintiff; that no competitor of the plaintiff was mentioned. The plaintiff, however, was not required by the contract to meet the market price, but only to meet a lower price of a competitor. The price of thirty cents a pound was fixed by the contract and there is nothing in the contract from which reasonably it could be inferred that the price was to be lowered to meet a decrease of price in the market.

The testimony of Louis G. Heiman was denied by Eager, who testified that he did have a conversation with Louis G. Heiman but that it was on March 14, 1923, which was after the delivery of the first shipment of caraway seed, namely, March 1, 1923; that in this conversation Heiman stated that Sokel and Company had given him a price of twenty-seven cents on February 27, 1923. We are not considering the denial of Eager, however, as it would not be permissible to do so in reviewing the trial court's action in directing a verdict for the plaintiff.

The letter signed "Heiman Bros." which we have referred to as relating to the evidence in question, contained this statement: "On Feb. 26 we were offered the caraway seed at 27¢ per lb. and we immediately called up Mr. Eager at Chicago and he said he would meet the price of 27¢." It does not appear, however, who made the offer.

Included in the verdict is interest to the amount of \$47.62 which the court allowed. We do not think that interest

"Q. After this contract was signed, did you call or have any conversation over the telephone with Mr. Hager? (The manager of the Chicago office of the plaintiff.)
"A. Yes, on the 27th day of February, 1933.
"Q. Just tell what was said by either one of you.
"A. I called up Mr. Hager and told him that the market price had come down to twenty-seven cents and under the contract I was entitled to the market price prevailing at the time. He said, 'I will call you back.' He called me back and said, 'All right, we will meet that price.'"

It will be observed that only the market price was

referred to, and not the price of a competitor of the plaintiff.

There is no competitor of the plaintiff was mentioned. The plaintiff,

however, was not required by the contract to meet the market price,

but only to meet a lower price of a competitor. The price of

twenty cents a pound was fixed by the contract and there is nothing

in the contract from which reasonably it could be inferred that the

price was to be lowered to meet a decrease of price in the market.

The testimony of Louis G. Neuman was denied by Hager.

It is testified that he did have a conversation with Louis G. Neuman

and that it was on March 14, 1933, which was after the delivery of

the first shipment of soybean meal, namely, March 1, 1933. That is

this conversation between Hager and Neuman was denied by Hager.

It is a price of twenty-seven cents on February 27, 1933. It was not

considering the denial of Hager, however, as it would not be permis-

sible to do so in reviewing the trial court's action in directing a

verdict for the plaintiff.

The letter signed "Neuman Bros." which we have referred

to as relating to the evidence in question, contained this state-

ment: "On Feb. 26 we were offered the soybean seed at 27 1/2 per lb.

and we immediately called up Mr. Hager at Chicago and he told us

that we had a right to 27 1/2. It was not until January, 1933

that we

Included in the verdict is interest to the amount of

\$41.43 which the court allowed. We do not think that interest

should have been allowed. If within ten days from the filing of this opinion the plaintiff will remit the amount of the interest, we will affirm the judgment; otherwise the judgment will be reversed and the cause remanded.

ASSIGNED UPON REHEARING;

OTHERWISE REVERSED AND REMANDED.

Hatchett, C. J., and Robinson, J., concur.

should have been stated. It might have been stated that the amount of the interest was collected and retained and that the amount of the interest was also retained. Otherwise the statement will be false.

THE STATE OF NEW YORK

IN SENATE, JANUARY 1, 1911.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE.

ALBANY: JAMES B. LEE, STATE PRINTER, 1911.

THE COMMISSIONER OF THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONER OF THE LAND OFFICE, DATED JANUARY 1, 1911.

THE REPORT OF THE COMMISSIONER OF THE LAND OFFICE, DATED JANUARY 1, 1911, IS HEREBY RECORDED. THE REPORT IS A VALUABLE CONTRIBUTION TO THE KNOWLEDGE OF THE LANDS OF THE STATE, AND IS WELL WORTHY OF THE ATTENTION OF THE SENATE.

JOHN W. ALLEN, CLERK.

RECEIVED JANUARY 1, 1911.

STATE OF NEW YORK.

THE COMMISSIONER OF THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONER OF THE LAND OFFICE, DATED JANUARY 1, 1911.

MICHAEL DERDZINSKI,
Appellee,

vs.

VASSILY LEWONENA and
PAULINA LEWONENA,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 618

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Vassily Lewonena and Paulina Lewonena, husband and wife, the defendants, from a judgment on a verdict which the trial court directed the jury to find in favor of Michael Derdzinski, the plaintiff.

The action was brought in the Municipal court of Chicago by the plaintiff on a promissory note for \$1050, executed by the defendants and payable to Roman Grzbielski, from whom the plaintiff alleges he bought the note. Grzbielski obtained the note from the defendants in payment of commissions which he claims to have earned by having procured a purchaser for property owned by the defendants.

The principal question in the case is whether the court was justified in directing a verdict for the plaintiff. Counsel for the plaintiff contend that the defendants are not entitled to a review of the case for the reason that the assignments of error of the defendants are too general and indefinite. There is no merit in the contention. The assignment of errors alleges that the court erred in over-ruling the motion for a new trial; and erred in instructing the jury to return a verdict for the plaintiff.

The facts are substantially as follows: Grzbielski, a total stranger to the defendants, called at their home one evening about 9:30 and told the defendants that he had a purchaser who wanted to buy certain property owned by the defendants. The de-

241 I.A. 618

THE UNITED STATES DEPARTMENT OF JUSTICE

This is an appeal by Francis Jackson and William

James, against and with, the defendant, from a judgment in a

verdict and the jury having found in favor of

the defendant, the United States District Court of

the District of Columbia, in the following case:

By the defendant and against the plaintiff, from the

plaintiff against the defendant, the United States District Court of

the District of Columbia, in the following case:

As was stated by the defendant, the plaintiff, from the

plaintiff against the defendant, the United States District Court of

the District of Columbia, in the following case:

As was stated by the defendant, the plaintiff, from the

plaintiff against the defendant, the United States District Court of

the District of Columbia, in the following case:

As was stated by the defendant, the plaintiff, from the

plaintiff against the defendant, the United States District Court of

the District of Columbia, in the following case:

As was stated by the defendant, the plaintiff, from the

plaintiff against the defendant, the United States District Court of

the District of Columbia, in the following case:

As was stated by the defendant, the plaintiff, from the

plaintiff against the defendant, the United States District Court of

the District of Columbia, in the following case:

defendant Waseily Lewonena, who was a mechanic, could not read or write English, and his wife, the defendant Paulina Lewonena, could not read or write any language. The negotiations with Grzbielski were conducted partly in the Polish language and partly in English. Grzbielski said that he had "people" who wanted to buy the property and he asked the defendants what price they would sell the property for. The defendants offered to sell the property for \$12,700. Grzbielski said he was going "to show the people that this contract cost \$13,750." The defendants agreed to give Grzbielski the difference between \$12,700 and \$13,750, namely \$1050, for his commissions. Grzbielski asked the defendants to sign the contract for the sale of the property, and also to sign, according to Waseily Lewonena, a "paper" that the defendants were "going to give" Grzbielski a commission. Waseily Lewonena said that he was "afraid to sign" his name; that he told Grzbielski that they had better go to the Metropolitan State Bank and make the contract. Grzbielski replied that it was late; that he would give the defendants \$100 that night and bring more money Saturday, and at that time they would go to the bank. Grzbielski gave the defendants \$100 and they signed a contract for the sale of the property for \$13,750, and also signed a judgment note for \$1050, payable to Grzbielski on demand. In the contract Grzbielski himself was named as the purchaser of the property. Paulina Lewonena signed both the contract and the note by making her mark. She was asked during her examination on the trial if she inquired of Grzbielski "what the paper meant - what the contents were." She replied, "I didn't know nothing to ask. I was from the old country, and he just told me. He said he will sell the house and I will sign this to pay commission." Grzbielski failed to sell the property under the contract. About three weeks later he produced a prospective purchaser by the name of Edward Jozzenozka, and a new contract was entered into between

Joszenzka and the defendants for the purchase of the property at the price of \$13,500. Joszenzka paid the defendants \$400. The contract was executed at the Metropolitan State Bank in the presence of an official of the bank who had drafted the contract. Joszenzka subsequently failed to perform the contract.

The evidence relating to the manner in which the plaintiff, Michael Derdzinski, obtained the note that is sued on is as follows: He first saw the note at the office of his brother Frank, who was a lawyer and also in the real estate business, and who was Grzbielski's attorney and also the attorney for Joszenzka. Michael Derdzinski had known Grzbielski for fifteen years and they had been doing business together for nine or ten years. At Grzbielski's request Michael Derdzinski purchased the note from Grzbielski for \$800. Michael Derdzinski testified that when he purchased the note he did not know what the note was given for, did not know anything about the defendants, and had never seen the defendants; that Grzbielski said that he had "been doing business with them for years;" that he, Derdzinski, did not find out what the note was given for until about three or four months after he purchased the note; that about that time he needed some money and asked Grzbielski to collect the note for him; that Grzbielski was unable to do so; that he, Derdzinski, believes that Grzbielski retained attorneys to collect the note through his, Derdzinski's, brother Frank.

Neither Grzbielski, Joszenzka, nor Frank Derdzinski testified on the trial.

There is no evidence that Grzbielski agreed to procure a purchaser ready, able and willing to buy the property of the defendants. There is an allegation in the plaintiff's statement of claim that Grzbielski "secured a purchaser ready and willing to purchase the property of the defendants." But there is no

[illegible]

evidence to support the allegation. The plaintiff does not deny this, but contends that the allegation may be treated as surplusage. We agree with this contention. 31 Cyc. p. 68. But when the allegation is treated as surplusage, the basis of the plaintiff's claim is merely the promissory note that is sued on, without any allegations in the statement of claim as to the purpose for which the note was given. The only evidence in regard to the purpose for which the note was given is the testimony of Wassily Lewonena. His testimony, which is rather indefinite, reasonably may admit of the inference that Grzbielski was not to be paid any commissions unless and until the defendants received \$12,700 from a purchaser that Grzbielski would procure. It must be borne in mind in considering the evidence in respect of the agreement between the defendants and Grzbielski, that the claim of the plaintiff is on the promissory note, and ^{on} not ~~on~~ an agreement between Grzbielski and the defendants that Grzbielski would procure a purchaser ready, able and willing to buy the property of the defendants. This is an important distinction which must not be overlooked in deciding the question whether the plaintiff's claim is based on a fraudulent transaction.

In regard to the question whether Grzbielski had performed his agreement and had earned his commissions when the defendants and Jozzenaska entered into the contract concerning the property, there may be reasonably debatable conclusions. It may be inferred from the evidence that Grzbielski was required to do something further, namely, to procure a purchaser who would actually perform his contract so that the defendants would receive \$12,700. Jozzenaska, however, defaulted on the contract. So far in our discussion of the evidence we have assumed for the sake of argument that the note was free from fraud. But we think that on the evidence the question of fraud is an issue.

We are of the opinion that the trial court committed reversible error in instructing the jury peremptorily to return a verdict in favor of the plaintiff.

The rule is that it is only proper to give a peremptory instruction to find for the plaintiff when there is no evidence tending to support any defense. Synan v. Manufacturers and Merchants Life Association, 263 Ill. 300, 308; Union Surety Company v. Tenney, 200 Ill. 349, 354. If the facts are conceded, or if there is no dispute with reference to the facts, and all reasonable men will agree from the evidence on the legitimate conclusions to be drawn from the evidence, then the question becomes one of law and not of fact. Sturm v. Consolidated Coal Company, 248 Ill. 20, 28. It is the rule that "the party against whom the motion is directed is entitled to the benefit of all the evidence in his favor in its most favorable aspects to him, and of all presumptions that may be reasonably drawn from such evidence." Yess v. Yess, 235 Ill., 414, 418. All contradictory evidence or explanatory circumstances must be rejected. Yess v. Yess, supra, (p. 418); Boston Farmer's Grain Company v. Fernandez Grain Co., 229 Ill. App., 102, 107.

In our view there were at least four material issues of fact which should have been submitted to the jury: First, whether the plaintiff was an innocent purchaser of the note; second, whether the note was obtained by Grzbielski through fraud; third, independently of the question of fraud, whether it was the intention of the defendants and the plaintiff that the amount of the plaintiff's commission, as agreed on in regard to the first contract in which the purchase price of the property was \$13,750, should be also the amount of the plaintiff's commission as to the second contract, in which the purchase price of the property was \$13,500; fourth, assuming that the note was valid, was it given on an agreement that it was not to be paid unless and until the de-

7
The fact of the opinion that the trial court committed
error is shown in factuating the jury accordingly to return a
verdict in favor of the plaintiff.

The rule is that it is only proper to give a summary

instruction to the jury for the plaintiff when there is no evidence
to support his claim. *Smith v. Smith*, 100 Cal. 100, 33 P. 100.
If the facts are controverted, as in
this case, the plaintiff is entitled to the benefit of the doubt.
The rule is that the plaintiff is entitled to the benefit of the doubt
when the facts are controverted. *Smith v. Smith*, 100 Cal. 100,
33 P. 100. The rule is that the plaintiff is entitled to the benefit
of the doubt when the facts are controverted. *Smith v. Smith*, 100
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benefit of the doubt when the facts are controverted. *Smith v.*
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benefit of the doubt when the facts are controverted. *Smith v.*
Smith, 100 Cal. 100, 33 P. 100. The rule is that the plaintiff is
entitled to the benefit of the doubt when the facts are controverted.

defendants received \$12,700 from a purchaser Grzbielski would procure?

Counsel for the plaintiff contend that on the evidence it may be said as a matter of law, that although the note was a demand note it was not purchased an unreasonable time after its execution by the plaintiff, and that therefore the plaintiff was an innocent purchaser of the note.

We do not think that it may be said, as a matter of law, that the plaintiff was an innocent purchaser. The determination of that question does not depend solely on the question whether there was an unreasonable delay in the negotiation of the note by Grzbielski, although in some circumstances the question of unreasonable delay in negotiating a demand note may be a mixed question of fact and law which should be submitted to a jury. In re Estate of Philpott, 169 Iowa, 553, 557, 558. In the case at bar the question whether there was an unreasonable delay in negotiating the note should be considered in connection with all of the other evidence in the case.

Facts which are relevant on the question whether the plaintiff was an innocent purchaser are as follows: The date of the note was June 7, 1923, and it was payable on demand. The plaintiff purchased the note about November 15, 1923. The plaintiff learned what the note was given for about three or four months after he purchased it, and about that time he asked Grzbielski to collect it for him. The action on the note was begun July 22, 1924. Through his brother, Frank Berdzinski, who was Grzbielski's and Jozzeneska's attorney, the plaintiff retained attorneys to bring the action on the note.

Counsel for the plaintiff contend that there is no evidence that Grzbielski was guilty of fraud in obtaining the note, and that therefore there was no question of fact to submit to the

Source: Author's calculations based on data from 1997-2000 business statistics.

1999

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1. That the plaintiff was an innocent purchaser. The defendant

1. The first of these is the fact that the Government has not yet decided whether it will accept the offer of the United States to provide a loan of \$100 million to the Government of the Republic of China for the purpose of financing the construction of a new airport at Taichung.

to form a new organization in the United States to represent the interests of the Chinese people in the United States.

THE UNIVERSITY OF CHICAGO LIBRARY
540 EAST 58TH STREET, CHICAGO, ILL. 60637

The following information is provided by the Bureau of Census:

Source: U.S. Department of Commerce, Bureau of Economic Analysis

10/1/54

Ent-Note was June 7, 1968, and it was visible on January, 1969. The

14-00000

...action on the new way ...

From July 22, 1964. Through his brother, Frank Bernhardt, who

RECEIVED THE SECRETARY OF THE ARMY
WASHINGTON, D. C. 20315

and that because there was no mention of that in what he said

jury in this respect.

In our opinion the evidence is of such character that reasonable men might differ on the question as to whether Grzbielski was guilty of fraud. There are facts and circumstances from which reasonably it might be inferred that Grzbielski's principal object in calling at the home of the defendants was to obtain fraudulently the note in question from the defendants. The undisputed evidence shows that Grzbielski did not explain to the defendants, who apparently were not well versed in business matters, that they were signing a judgment note payable on demand; that Grzbielski unnecessarily persuaded the defendants to sign the note at night without waiting until the next day to go to the bank; that Grzbielski told the defendants that he had a purchaser for their property before the defendants had stated the price of the property; that although Grzbielski said he had a purchaser, he inserted his own name in the first contract as purchaser; that Grzbielski did not produce a purchaser until about three weeks after the note was signed, and that purchaser was not able to perform the contract.

For the reasons stated the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McCurely, J., concur.

* 1998-1999, 2000-2001, 2002-2003

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... ..

R. G. LUDWIG, Doing Business
as R. G. LUDWIG & CO.,
Appellee.

vs.

VALENTINE GEISEN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 619

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago, brought by R. G. Ludwig, doing business as R. G. Ludwig & Company, the plaintiff, against Valentine Geisen, the defendant, to recover \$810 alleged to be due to the plaintiff as commissions for the sale of property owned by the defendant.

There have been two trials of the case, each trial before a jury. On the first trial the jury found in favor of the defendant. On motion of the plaintiff the court granted a new trial. On the second trial the jury found in favor of the plaintiff and assessed the damages at \$810. The court entered judgment on the finding. From this judgment the defendant has prosecuted this appeal.

Briefly stated the pertinent facts are as follows: The plaintiff was a real estate broker with offices in the city of Chicago. The defendant owned property which he desired to sell. The plaintiff and the defendant entered into a written contract on March 17, 1925, in which the defendant gave the plaintiff the exclusive right to sell his property within ninety days from the date of the contract. According to the terms of the contract the price of the property was \$27,000, and the commissions of the plaintiff were to be estimated on the customary rate fixed by the Chicago Real Estate Board. The rate was three per cent. of the selling price. The plaintiff procured a purchaser within ninety days who was ready, willing and able to buy the property of the defendant. In drafting the contract giving

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SAL I. A. 619

the plaintiff the exclusive right to sell the property of the defendant a printed form was used. In this form blank spaces are left for the amounts of the cash payment and the selling price to be inserted in writing. In the contract in evidence both of the blank spaces have been filled out in ink, the amount of the cash payment which the defendant was to receive being \$10,000, and the amount of the selling price being \$27,000.

The principal question in the case, which is one of fact only, is whether the amount of the cash payment which the defendant was to receive was inserted in the blank space in the printed form of the contract at the time the contract was executed, or whether the space was left blank at the time of the execution of the contract. On this question the evidence is conflicting. The defendant testified that before the contract was signed he stated that he "must have all of his cash out, \$13,500;" and that the space in the contract for the amount of the cash payment was left blank when he signed the contract. An employee of the plaintiff testified that he prepared the contract, and that \$10,000, the amount of the cash payment, was inserted in the contract by him in ink before the defendant signed the contract. Another employee of the plaintiff testified that he was present when the contract was signed by the defendant, and that the amount \$10,000 was in the contract when the defendant signed the contract.

The jury were instructed by the court specifically that if they believed from a preponderance of the evidence that the defendant refused to accept the offer of a \$10,000 cash payment, but agreed to sell for a cash payment of \$13,500, then the jury must find for the defendant. The jury were also instructed by the court specifically that if they believed from a preponderance of the evidence that at the time of the signing of the con-

tract the space in which the \$10,000 was written was left blank and there was a verbal agreement between the parties that the cash payment should be \$13,500, then the jury must find for the defendant.

We do not think that the verdict of the jury should be disturbed. The rule is a familiar one that it is the special province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Elevator Company v. Hale, 201 Ill., 131, 143.

For the reasons stated the judgment is affirmed.

APPROVED.

Mattonetti, P. J., and McBurney, J., concur.

241 I.A. 619

LAWRENCE M. MARGIS, (Plaintiff),
Appellant,

vs.

SAMUEL McCALLEN and CHARLES B. HALE,
Doing Business as Mechanical
Specialties Mfg. Co., (Defendants),
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago brought by Lawrence M. Margis, the plaintiff, against Samuel McCallen and Charles B. Hale, doing business as Mechanical Specialties Manufacturing Company, upon two checks, each for the sum of \$500. The statement of claim alleges that \$50 was paid on account of the notes but does not allege the date of the payment. No service of summons was had upon the defendant Hale. The defendant McCallen filed an affidavit of merits in which, among other pleas, the statute of limitations was pleaded. The cause was heard before the court without a jury.

On motion of the plaintiff the court struck the defendant McCallen's affidavit of merits from the files. McCallen elected to stand by the affidavit. On April 6, 1925, the court entered judgment against McCallen as of default for \$950 and costs. McCallen was granted an appeal from the judgment. On April 20, 1925, within 30 days after the entry of the judgment, the plaintiff made a motion that the judgment be set aside, and that leave be granted to the plaintiff to amend his statement of claim so that it would show the date on which the payment of \$50 was made. The court denied the motion. On May 2, 1925, within 30 days after the entry of the judgment, the plaintiff made a motion to set aside the judgment and to dismiss the cause without prejudice. The court denied the motion. From this order of the court the plaintiff was prosecuted

SAI I. A. 619

AMERICAN BANK NOTE COMPANY

COUNT OF CHARGE

LAMARCA A. GARCIA (Defendant)

AMERICAN BANK NOTE COMPANY
Defendant
Lamarc A. Garcia (Defendant)
Lamarc A. Garcia (Defendant)
Lamarc A. Garcia (Defendant)

THE COURT OF THE DISTRICT OF COLUMBIA

IN RE: LAMARCA A. GARCIA

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

Defendant

Plaintiff

this appeal.

We are of the opinion that in furtherance of justice the court should have allowed the plaintiff's motion to vacate the judgment and dismiss the cause. Goodwillie v. Schaub, 63 Ill. App. 311, 312; Krieger v. Krieger, 221 Ill., 479, 484.

The order of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McSurely, J., concur.

1911, 1912, 1913.

It is to be noted that in 1911, 1912, and 1913 the water levels were above the normal level. In 1911, the water level was 1.5 feet above the normal level. In 1912, the water level was 1.0 foot above the normal level. In 1913, the water level was 0.5 foot above the normal level.

1914, 1915, 1916.

1917, 1918, 1919.

1920, 1921, 1922, 1923, 1924.

1925.

CENTRAL REALTY & INVESTMENT COMPANY,
a Corporation,

Appellant,

vs.

PATRICK W. BARRETT, TIMOTHY A.
BARRETT, THOMAS F. BARRETT and
JAMES J. BARRETT,

Appellees.

241 L.A. 61

APPEAL FROM CIRCUIT COURT

OF COCK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action by the Central Realty & Investment Company, a corporation, the plaintiff, against Patrick W. Barrett, Timothy A. Barrett, Thomas F. Barrett and James J. Barrett, the defendants, to recover commissions as agent for the defendants in a matter concerning an alleged exchange of properties between the Donaldsonville and Ashburn Oil Mills and the defendants.

The case was tried before the court without a jury. The court found in favor of the defendants and entered judgment on the finding. From the judgment the plaintiff has prosecuted this appeal.

The testimony is somewhat lengthy, but in the view we take of the case it will be necessary to state only the following facts: The defendants were the owners of property in Chicago known the Dorchester Apartment hotel, and the plaintiff's were the owners of property in the state of Georgia known as the Red Pebble farm. Through the efforts of an employee of the plaintiff, Fred Elliott, these parties entered into negotiations with each other in regard to the exchange of their properties. On the trial it was agreed between the plaintiff and the defendants that if the plaintiff was entitled to recover, plaintiff's commission should be estimated at \$12,000. For a time the negotiations between the plaintiff and the Donaldsonville and Ashburn Oil Mills were conducted by correspondence.

2411 A. 619
 APPEAL FROM CIRCUIT COURT
 OF COOK COUNTY.

CENTRAL REALTY & INVESTMENT COMPANY,
 a Corporation,
 Appellant,
 vs.
 TIMOTHY A. HARRIST, THOMAS E. HARRIST and
 JAMES J. HARRIST,
 Appellees.

MR. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT.

This is an action by the Central Realty & Investment Company, a corporation, the plaintiff, against Patrick W. Harrist, Timothy A. Harrist, Thomas E. Harrist and James J. Harrist, the defendants, to recover compensation as agent for the defendants in a matter concerning an alleged exchange of properties between the defendants and Abraham Old Mills and the defendants.

The case was tried before the court without a jury. The court found in favor of the defendants and entered judgment on the finding. From the judgment the plaintiff has prosecuted this appeal.

The testimony is somewhat lengthy, but in the view we take of the case it will be necessary to state only the following facts: The defendants were the owners of property in Chicago known as the Rochester Apartment Hotel, and the plaintiff was the owner of property in the state of Georgia known as the Red Bank Farm. Through the efforts of an employee of the plaintiff, Fred Mills, there parties entered into negotiations with each other in regard to the exchange of their properties. On the trial it was agreed between the plaintiff and the defendants that if the plaintiff was entitled to recover, plaintiff's compensation should be calculated as follows: For a term the negotiations between the plaintiff and the defendants and Abraham Old Mills were conducted by correspondence.

The important fact that should be emphasized during this period of the negotiations is that the defendants were not willing to make an exchange of properties unless they could obtain \$100,000 cash in the transaction. When Elliott first mentioned the matter of the exchange to the defendants, Patrick W. Barrett, speaking for the defendants, asked Elliott if the farm of the Donaldsonville and Ashburn Oil Mills had "any loan value." Elliott replied that he thought it had, but did not know how much; that he could find out. Barrett said, "I wish you would find out because if it has not any loan value we would not be interested." After failing to agree on the terms of the exchange during the negotiations by correspondence, Patrick W. Barrett, James J. Barrett and Elliott went to Georgia to negotiate further. Before they left Chicago, Patrick W. Barrett refused to go to Georgia until he had some definite proposition in regard to the terms of the proposed exchange. Elliott then wrote a letter addressed to the defendants, in which he agreed, on behalf of the plaintiff, to pay the expenses of the two defendants to Georgia, and in which he made the following statements:

"The owners of the Red Pebble Farm are to be able, ready and willing to pay you \$100,000 in money and a portion of the Red Pebble clear of encumbrance, or a larger portion of the Red Pebble farm, subject to \$100,000 mortgage. The above offer is made to guarantee you against making a useless trip to Georgia, and is in lieu of a signed contract because we believe that you can make a better deal by being able to openly negotiate with them after inspecting their property."

In the negotiations in Georgia the defendants still insisted on terms which would give them \$100,000 cash. The officials of the Donaldsonville and Ashburn Oil Mills were unwilling to mortgage the Farm to raise the \$100,000, as the Farm was already heavily encumbered; but they suggested that the defendants could obtain the \$100,000 through a loan from the Citizens and Southern Bank of Atlanta, "as the Bank and the Mills were the same people." The negotiations finally resulted in the

The important fact that should be emphasized during this period of the negotiations is that the defendants were not willing to make an exchange of properties unless they could obtain \$100,000 cash in the transaction. When Elliott first mentioned the matter of the exchange to the defendants, Patrick W. Barrett, speaking for the defendants, asked Elliott if the fact of the Danabonville and Ashburn Old Mills had "any less value." Elliott replied that he thought it had, but did not know how much; that he could find out. Barrett said, "I wish you would find out because it is not any less value we would not be interested." After failing to agree on the terms of the exchange during the negotiations by correspondence, Barrett, James J. Barrett and Elliott went to Georgia to discuss further. Before they left Chicago, Patrick W. Barrett agreed to go to Georgia until he had some definite proposition in regard to the terms of the proposed exchange. Elliott then wrote a letter addressed to the defendants, in which he agreed, on behalf of the plaintiff, to pay the expenses of the two defendants in Georgia, and in which he made the following statement:

"The owners of the Red Pebble Farm are to be paid, ready and willing to pay you \$100,000 in money and a portion of the Red Pebble Farm, about of an amount, of a larger portion of the Red Pebble Farm, subject to \$100,000 mortgage. The above offer is made to guarantee you against making a business trip to Georgia, and is in lieu of a slight contract because we have given that you make a better deal by being able to negotiate with them after inspecting their property."

In the negotiations in Georgia the defendants still insisted on terms which would give them \$100,000 cash. The defendants of the Danabonville and Ashburn Old Mills were unwilling to mortgage the farm to raise the \$100,000, as the farm was already heavily encumbered; but they suggested that the defendants could obtain the \$100,000 through a loan from the Citizens and Southern Bank of Atlanta, "as the Bank and the Mills were the same people." The negotiations finally resulted in the

signing of a written contract by the defendants and the Donaldsonville and Ashburn Oil Mills for the exchange of their properties. At the time that the contract was signed a written communication was addressed to the defendants by W. W. Banks, a stockholder and director in the Donaldsonville and Ashburn Oil Mills, and also vice-president and executive manager of the Citizens and Southern Bank of Atlanta, in which Banks stated that the Citizens and Southern Bank of Atlanta "will see that you are made a loan of One Hundred Thousand Dollars (\$100,000) on the land to be conveyed to you by said Oil Mills." The contract, which was prepared by Arthur S. Bussey, the president of the Donaldsonville and Ashburn Oil Mills, and also the attorney for the Mills, sets forth in detail and at length the terms of the proposed exchange of properties. The contract contained no provision, however, in regard to the \$100,000 that the defendants desired to obtain. Before the contract was signed by the defendants, Patrick W. Barrett said to Bussey that the defendants would not sign the contract unless a clause was inserted in the contract that the contract would not be binding upon the defendants until it was approved by John T. Fitzgerald, an attorney for the defendants in Chicago. Bussey stated that he had no objection to the attorney for the defendants "putting the terms of the contract, as agreed upon, in any form that he might desire," but that he, Bussey, "wished to know whether or not" the Donaldsonville and Ashburn Mills "had a definite and satisfactory contract" with the defendants "as to terms;" that Patrick W. Barrett said that "the terms of the contract were agreeable and satisfactory to" the defendants.

The following paragraph, which was drafted by Bussey, was then added to the contract:

"The Barretts have executed this contract subject to the approval thereof by Mr. John T. Fitzgerald, Attorney at Law, Chicago, Ill., as to its legality and form, and their right to

...of a written contract by the defendant and the defendant
...and Andrew Oil Mills for the exchange of their properties.
At the time that the contract was signed a written communication
was addressed to the defendant by W. W. Banks, a stockholder and
director in the Bondholders' Oil Mills, and also
vice-president and executive manager of the Citizens and Southern
Bank of Atlanta, in which Banks stated that the Citizens and
Southern Bank of Atlanta "will see that you are made a loan of
One Hundred Thousand Dollars (\$100,000) on the land to be conveyed
to you by said Oil Mills." The contract, which was prepared by
Arthur B. Hanes, the president of the Bondholders' Oil Mills and Andrew
Oil Mills, and also the attorney for the Mills, sets forth in the
preamble and at length the terms of the proposed exchange of prop-
erty. The contract contained no provision, however, in regard to
the \$100,000 that the defendant desired to obtain. Before the
contract was signed by the defendant, Nathan W. Barrett said to
Hanes that the defendant would not sign the contract unless a
clause was inserted in the contract that the contract would not be
binding upon the defendant until it was approved by John T. Pitt-
ers, an attorney for the defendant in Chicago. Hanes stated
that he had no objection to the attorney for the defendant "put-
ting the name of the contract, as stated above, in the contract."
The contract was then signed by the defendant, Nathan W. Barrett,
and Nathan W. Barrett said that "the terms of the contract were agree-
able and satisfactory to" the defendant.
The following paragraph, which was drafted by Hanes,
was then added to the contract:
"The defendant have executed this contract subject to the
approval thereof by Mr. John T. Pitters, Attorney at Law,
Chicago, Ill., as to its legality and terms, and their right to

have a more definite and binding contract executed between the parties touching the matter above referred to, in the event he determines that protection of their interest so requires."

It is upon the construction of this paragraph that the question whether the contract was final and complete depends.

Before the contract was signed, and while the negotiations were in such a state of uncertainty that it looked as if the parties would not agree on the terms of the contract, Patrick W. Barrett and Elliott had a discussion in regard to the plaintiff's commissions, the substance of the discussion being embodied in a written form as follows:

"Central Realty Agency and Loan Co.,
Chicago, Ill.
Mr. Fred Elliott
Dear Sir:

This is to certify that if a deal is consummated between us and the Citizens and Southern Bank of Atlanta, Georgia, on an exchange of our building known as the Dorchester Apartment Hotel and 3000 acres (more or less) of lands in Turner and Wilcox Counties, Georgia. That you are the only broker representing us and that we are to pay you for your services the sum of Ten Thousand (\$10,000) Dollars cash and some land equities which will be decided on at a later date.

Yours truly,
Barrett Bros.
By _____

This agreement was not signed but the absence of signatures is not a question in controversy. Patrick W. Barrett and James J. Barrett returned to Chicago. When the contract was submitted to Fitzgerald, the defendants' attorney, Fitzgerald, refused to approve the contract and wrote a letter to W. F. Banks, in which he stated fully his reasons for his refusal.

Subsequent to Fitzgerald's letter unsuccessful efforts were made by the parties to come to an agreement; and the Donaldsonville and Ashburn Oil Mills wrote a letter to Fitzgerald in which they stated that "the breach of the contract" by the defendants "is now accepted by us as a rescission of the contract."

have a more definite and binding contract executed between the parties regarding the matter above referred to, in the event the defendant's protection of their interest as required."

At the time it is upon the constitution of this paragraph that the question whether the contract was final and complete depends.

Before the contract was signed, and while the negotiations were in such a state of uncertainty that it looked as if

the parties would not agree on the terms of the contract, Patrick

W. Harvey and Elliott had a discussion in regard to the plain-

iff's commission, the substance of the discussion being embodied

in a written form as follows:

Harvey: "Gentlemen, Realty Agency and Loan Co.,
Chicago, Ill.
Mr. Fred Elliott
Dear Sir:

This is to certify that if a deal is consummated between us and the Citizens and Southern Bank of Atlanta, Georgia, on an exchange of our building known as the "Payson Hotel" and 3000 acres (more or less) of land in Texas and Wilson County, Georgia, that you are the only broker representing us and that we are to pay you for your services the sum of Ten Thousand (\$10,000) Dollars cash and some land equal in value which will be included on at a later date.

Yours truly,
Harvey W. Harvey

It is to be noted that this agreement was not signed by the absence of the defendant's signature in controversy. Patrick W. Harvey and James J. Harvey returned to Chicago. When the contract was

submitted to the defendant's attorney, Fitzgerald,

retained to approve the contract and wrote a letter to W. W.

Harvey, in which he stated fully his reasons for his refusal.

Subsequent to Fitzgerald's letter mentioning et-

ters were made by the parties to an agreement; and the

contract was made and Arthur G. Ellis wrote a letter to Fitzgerald

in which they stated that "the breach of the contract" by the

defendant "is now accepted by us as a termination of the contract."

It is contended by counsel for the defendants that the plaintiff is not entitled to recover for the reason that, according to the terms of the agreement between the plaintiff and the defendants, the plaintiff was to receive commissions only "if a deal is consummated between" the defendants "and the Citizens and Southern Bank of Atlanta;" and that the deal was never consummated.

If the agreement alone should be considered, since the exchange of properties between the defendants and the Donaldsonville and Ashburn Oil Mills was never effected and therefore the deal was not in fact consummated, it may be that the plaintiff would not be entitled to recover any commissions. But when the circumstances in which the agreement was made are considered, we think that on a fair construction of the agreement, the plaintiff and the defendants used the phrase "if the deal is consummated" in reference to the execution of a valid, binding contract between the defendants and the Donaldsonville and Ashburn Oil Mills.

The principal question in the case is whether the contract between the defendants and the Donaldsonville and Ashburn Oil Mills was accepted by the defendants as a completed contract. Other questions are discussed in the briefs of counsel, but in the view we take of the principal question, it will not be necessary to consider the other questions.

Counsel for the defendants maintain that the contract was not a completed contract; that it was a conditional contract which was not to be final unless it was approved by Fitzgerald, the attorney for the defendants.

Counsel for the plaintiff contends that the contract was a valid, binding contract; that the paragraph in respect of Fitzgerald's approval "limited the scope of Mr. Fitzgerald's approval to 'form and legality' and to the matters embraced within the contract;" that Fitzgerald was authorized to change the form of the

It is contended by counsel for the defendant that the plaintiff is not entitled to recover for the breach of the contract. It is the contention of the plaintiff that the contract was made between the plaintiff and the defendant, and that the defendant is liable for the breach of the contract. The plaintiff contends that the contract was made between the plaintiff and the defendant, and that the defendant is liable for the breach of the contract. The defendant contends that the contract was not made between the plaintiff and the defendant, and that the defendant is not liable for the breach of the contract. The court will consider the evidence and the law in this case.

contract, but was not authorized to change or reject the terms specified in the contract; that Fitzgerald did not disapprove of the form or the legality of the contract but objected mainly to the contract because it did not contain a provision by which the defendants would obtain \$100,000 on the exchange of the properties. In support of their contentions, counsel for the plaintiff cites the following authorities: Sanders v. Pettlitzer, 114 N. Y. 309; Rossiter v. Miller, 3 Appeal Cases, 1124; Fowle v. Freeman, 9 Vesey 351; Hall v. Hall, 125 Ill. 95.

In our opinion the contract was not accepted by the defendants as a completed contract. We think that it was a conditional contract, dependent upon the approval in good faith and in a reasonable time of the defendants' attorney, Fitzgerald; and that since Fitzgerald disapproved of the contract, and since neither the question of good faith nor time is raised by the plaintiff, the contract did not become effective. We have reached this conclusion from a consideration of the contract alone, independently of the background of the contract. In the paragraph which was added to the contract, and which provided for the approval of the contract by the defendants' attorney, Fitzgerald, the approval of Fitzgerald was not limited to the question only of the legality and form of the contract. After stating that the contract should be subject to the approval of Fitzgerald as to its "legality and form," the paragraph gave the defendants the further right "to have a more definite and binding contract executed between the parties touching the matter above referred to, in the event he [Fitzgerald] determines that protection of their interest so requires." If the contract was intended to be submitted to Fitzgerald for his approval as to its legality and form only, the clause which follows the words "legality and form" in the paragraph never should have been added. If we impute the intent to the parties to limit Fitzgerald's approval of

contract, but was not intended to transfer or release the former
 specified in the contract; that defendant did not disavow or
 the term on the legality of the contract but objected mainly to
 the contract because it did not contain a provision by which the
 defendant would obtain \$100,000 on the exchange of the property.
 support of their contention, counsel for the plaintiff cited
 the following authorities: Banker v. Bell, 113 N. Y. 200;
Banker v. Bell, 5 App. Cases, 1134; Bank v. Bell, 2
Bank v. Bell, 122 N. Y. 200.
 In our opinion the contract was not accepted by the
 defendant as a completed contract. We think that it was a condi-
 tioned contract, defendant upon the answer in good faith and in a
 reasonable use of the defendant's attorney, reasonably and
 with the defendant's attorney as his agent, and that the
 question of good faith now time is raised by the plaintiff, the
 contract did not become effective. We have reached this conclusion
 from a consideration of the contract itself, defendant to the
 defendant of the contract. In our opinion the contract was not
 the contract, and which provided for the transfer of the contract
 by the defendant's attorney, defendant, the contract of the contract
 was not stated in the contract itself as the legality was not at
 the contract. After stating that the contract would be valid
 as the contract of the contract as in the "legality" the law, the
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 contract and which contract provided for the transfer of the contract
 the matter above referred to, in the event the [defendant] determination
 that protection of their interest as required. If the contract was
 intended to be executed as intended for the contract as in the
 legality and form only, the clause which follows the words "legality"
 and that in the paragraph never would have been added. If we

the contract to legality and form only, then the insertion of the clause immediately following the words "legality and form" merely served to obscure and confuse such intent of the parties; and in order that the clause should have such imputed meaning, the clause would have to be construed as expressing in different phraseology the same idea as the preceding clause, namely, that Fitzgerald's approval extended only to the "legality and form" of the contract. In other words, after the paragraph had provided in terms in one clause that the contract was to be submitted to Fitzgerald for his approval as to "legality and form," we must assume that the paragraph unnecessarily repeated the same idea in another clause immediately following the first clause. But in our opinion the language of the paragraph reasonably will not admit of such an interpretation. In our view the clause following the words "legality and form" was intended to confer substantially different and broader powers on Fitzgerald. According to that clause Fitzgerald had the right to make "a more definite and binding contract" in regard to the matter contained in the contract as drafted, in the event that he should determine that this was required in order to protect the interest of the defendants. The clause did not provide that Fitzgerald might make only the particular contract as drafted more definite and binding. It provided generally that he might make "a more definite and binding contract." The only restrictions on Fitzgerald's power were that such a contract should be limited to the "matter above referred to," that is, the matter in the contract as drafted, and should be made if in his discretion such a contract was necessary for the protection of the interest of the defendants. We do not think that if Fitzgerald determined that the protection of the interest of the defendants required "a more definite and binding contract," he was restricted, in the preparation of such contract, merely to changing the form or phraseology

the contract to legally and form only, then the insertion of the clause immediately following the words "legally and form" merely served to obscure and confuse such intent of the parties; and in order that the clause should have such intended meaning, the clause would have to be construed as expressing in different phraseology the same idea as the preceding clause, namely, that Wigmore's agreement extended only to the "legally and form" of the contract. In other words, after the paragraph had provided in terms in one clause that the contract was to be submitted to Wigmore for his approval as to "legally and form," we must assume that the paragraph unnecessarily repeated the same idea in another clause immediately following the first clause. But in our opinion the language of the paragraph necessarily will not admit of such an interpretation. In our view the clause following the words "legally and form" was intended to confer substantially different and broader powers on Wigmore. According to that clause Wigmore had the right to make "a more definite and binding contract" in regard to the matter contained in the contract as drafted, in the event that he should determine that this was required in order to protect the interest of the defendant. The clause did not provide that Wigmore might make only the particular contract as drafted more definite and binding. It provided generally that he might make "a more definite and binding contract." The only restrictions on Wigmore's power were that upon a contract should be limited to the "matter above referred to," that is, the matter in the contract as drafted, and would be made by in his discretion such a contract was necessary for the protection of the interest of the defendant. We do not think that Mr. Wigmore determined that the protection of the interest of the defendant required "a more definite and binding contract," he was restricted, in the preparation of such contract, merely to changing the form or phraseology

of the contract as drafted. In our opinion he was authorized to alter materially the contract as drafted, and even to reject provisions of that contract, provided that he was of the opinion in good faith that the protection of the interest of the defendants so required. If in his opinion the interest of the defendants could not be protected merely by changing the form and phraseology of the contract as drafted, he had the right to make changes of substance in the contract.

Since he was the final arbiter, the questions whether his decision in regard to the necessity of a more definite and binding contract was correct or incorrect, or reasonable or unreasonable, are not involved, provided that in reaching his decision he was actuated by an honest purpose to protect the interest of the defendants. And his honesty of purpose is not questioned by the plaintiff. In this situation we do not think that the minds of the parties had met in regard to the terms of the contract as drafted. In our opinion the contract, as drafted, was a conditional contract only, subject to material and substantial changes which Fitzgerald might make, and which might necessitate further negotiations by the parties before a definite final contract could be agreed upon.

In this view it is unnecessary to consider the reasons that Fitzgerald gave for not approving the contract as drafted. The controlling question is the one that we have decided, namely, that by providing that the contract as drafted should be subject to Fitzgerald's approval, the parties did not accept the contract as drafted as a final completed contract.

It may be stated, however, that Fitzgerald gave other reasons for not approving the contract as drafted, than the reason that the contract did not contain a provision in regard to the \$100,000 which the defendants desired to obtain in the exchange of properties.

of the contract as drafted. In our opinion no was authorized to
alter materially the contract as drafted, and even to reject pro-
visions of that contract, provided that he was at the same time in
good faith that the protection of the interest of the defendant is
required. It is the opinion the interest of the defendant could
not be protected merely by changing the form and terminology of the
contract as drafted, he had the right to make changes of substance
in the contract. What is the
question. Since he was the final arbiter, the question whether
his decision is subject to the necessity of a more definite and
binding contract was correct or incorrect, or reasonable or unreasonable
this, and not involved, provided that in reaching his decision he
was motivated by an honest purpose to protect the interest of the
defendant. And his honesty of purpose is not questioned by the
plaintiff. In this situation we do not think that the minds of the
parties had not in regard to the terms of the contract as drafted.
In our opinion the contract, as drafted, was a conditional contract
subject to material and substantial changes which the defendant
might make, and which might necessitate further negotiations by the
parties before a definite final contract could be arrived upon.
In this view it is unnecessary to consider the reason
that the defendant gave for not approving the contract as drafted.
The controlling question is the one that we have decided, namely,
that by providing that the contract as drafted should be subject to
the defendant's approval, the parties did not accept the contract as
drafted as a final completed contract.
It may be stated, however, that the defendant gave other
reasons for not approving the contract as drafted, than the reason
that the contract did not contain a provision in regard to the
\$100,000 which the defendant desired to obtain in the exchange of

We are strengthened in the conclusions we have reached in respect of the conditional nature of the contract as drafted, when that contract is considered in connection with the facts leading up to its execution, and the circumstances in which it was signed.

We do not think that the cases cited by counsel for the plaintiff support his contention that under the paragraph which was added to the contract as drafted, the contract was subject to Fitzgerald's approval only as to "legality and form." The facts in those cases are materially different from the facts in the case at bar. In the cases of Sanders v. Rottlitzer, supra, and Rossiter v. Miller, supra, the terms of the contract had been agreed upon fully and definitely by correspondence, and all that was necessary to be done was to embody those terms in a formal contract. In the case of Fowler v. Freeman, supra, the parties had agreed on the terms of a contract in a written memorandum, which was sent to the solicitor of one of the parties for the solicitor to prepare a formal contract. In the case of Hall v. Hall, supra, the parties, after executing a written contract complete in itself, verbally agreed that a more formal contract should be drawn up and executed.

Since we are of the opinion that the defendants and the Donaldsonville and Ashburn Oil Mills did not enter into a valid binding contract, it follows that the plaintiff is not entitled to recover commissions.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

We are strengthened in the conclusion we have reached in respect of the conditional nature of the contract as drafted, when that contract is considered in connection with the facts looking up to its execution, and the circumstances in which it was signed.

We do not think that the cases cited by counsel for the plaintiff support his contention that under the paragraph which was added to the contract as drafted, the contract was held to be invalid only as to "legality and form."

The facts in those cases are materially different from the facts in the case at bar. In the case of Bankers v. Halil, supra, the contract had been agreed upon orally and definitively by correspondence, and all that was necessary to be done was to embody those terms in a formal contract. In the case of Levy v. Fink, supra, the parties had agreed on the terms of a contract in a written memorandum, which was sent to the defendant by one of the parties for the collector to prepare a formal contract. In the case of Halil v. Bankers, supra, after executing a written contract complete in itself, the parties agreed that a more formal contract should be drawn up and signed.

Since we are of the opinion that the defendant and the plaintiff entered into a valid contract, it follows that the plaintiff is not entitled to recover damages.

For the reasons stated the judgment of the trial court is affirmed.

Attest, J. J. and Margaret J. J. court.

ALBANY, N. Y.

FLEETWOOD PRESTON,
Appellee,
vs.
LEON TATZ,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 619

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Fleetwood Preston, the plaintiff, against Leon Tatz, the defendant, to recover damages for injuries alleged to have been caused by the negligence of the defendant in not keeping the stairways of a building owned by him properly lighted.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$2000, and the court entered judgment on the verdict. From the judgment the defendant has prosecuted the present appeal.

All of the assignments of error of the defendant relate to matters which are not part of the record unless preserved by a bill of exceptions; and as the bill of exceptions has been stricken from the record, the assignments of error cannot be reviewed.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

W. A. JACKSON CO., a Corporation,
Appellee,

vs.

ELABORATED READY ROOFING COMPANY,
a Corporation,
Appellant.

241 I.A. 619

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal Court of Chicago, brought by W. A. Jackson Co., a corporation, the plaintiff, against the Elaborated Ready Roofing Company, a corporation, the defendant, to recover from the defendant a balance of \$551.61 alleged to be due for labor and material furnished by the plaintiff to the defendant. The case was tried before the court without a jury on an agreed statement of facts. The court found the issues against the defendant and assessed the plaintiff's damages at \$551.60. From the judgment on the finding the defendant has prosecuted this appeal.

The facts briefly stated are as follows: W. E. Martin, doing business as W. E. Martin and Company, desired to make purchases from the plaintiff on credit, but owing to Martin's unsatisfactory rating and financial responsibility, the plaintiff refused to extend credit to Martin unless the defendant would sign the requisitions for the goods which were to be delivered by the plaintiff to Martin. The defendant agreed to sign the requisitions, and an account was opened on the books of the plaintiff in the name of the defendant. All of the payments to the plaintiff were made by Martin, but the payments were credited to the account of the defendant. At no time did the defendant make any payments to the plaintiff. This practice continued until April 3, 1925, up to which time Martin had made purchases amounting to \$1585.97, and had made payments aggregating \$1000. On April 3, 1925, the

241 I.A. 612

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plaintiff opened an account directly with W. C. Martin and Company. It will be observed that at this time there was a balance due on the account of the defendant amounting to \$585.97 for goods purchased by Martin. After the plaintiff opened the account with W. C. Martin and Company, the plaintiff charged all goods which were ordered by Martin to that account and credited the account with all the payments that Martin made. On November 7, 1924, the payments made by Martin after the plaintiff had opened the account with W. C. Martin and Company, aggregated \$600 and showed that the account was overpaid to the amount of \$33.45.

The contention of the defendant is that all of the payments made by Martin, both the payments made before the account was opened with W. C. Martin and Company, and the payments made after the opening of that account, should have been applied by the plaintiff to the account of the defendant. In our opinion the payments made to the plaintiff by Martin after the plaintiff opened the account with W. C. Martin and Company were credited properly to the account of W. C. Martin and Company. There is no evidence of any agreement between the plaintiff and the defendant that all the payments made by Martin should be credited to the account of the defendant. There is no evidence of any collusion between the plaintiff and Martin. Counsel for the defendant maintain that the plaintiff had no "right to disregard, arbitrarily, a course of action which it had itself instituted and pursued with the knowledge of the defendant, and apply the payments made by Martin to any other account than that of the defendant, as it had heretofore pursued;" that "when the plaintiff, arbitrarily, without the knowledge of the defendant and without notice to the defendant opened a new account and extended credit to W. C. Martin and accepted payments of more than sufficient to discharge the defendant from any liability whatever, the rights of the defendant were unjustly

prejudiced in such application."

We do not agree with the contentions of counsel for the defendant. We do not think that the plaintiff was under a legal duty to notify the defendant that the plaintiff had opened a separate account with W. C. Martin and Company. We are unable to perceive how such a duty could arise in the circumstances. In our opinion there is no evidence from which it could be inferred that the plaintiff owed the defendant any such duty. Apparently counsel for the defendant assume that such a duty was created by reason of the fact that before the opening of the separate account, the practice of the plaintiff had been to apply the payments made by Martin to the account of the defendant. But although such a practice had existed, it does not follow that plaintiff was under a legal duty to notify the defendant that the plaintiff had opened a separate account with W. C. Martin and Company. There is no evidence from which it could be inferred that the plaintiff was precluded from extending credit directly to Martin. Furthermore, the defendant was not dependent upon the plaintiff alone for information in regard to the actions of Martin. From the fact that the defendant was in the nature of a guarantor for Martin, reasonably it would be presumed that the defendant would keep informed as to the payments that Martin was making on the defendant's account with the plaintiff.

We fail to understand why the defendant apparently made no effort to obtain information in regard to its account with the plaintiff, particularly in view of the fact that the account was kept for the benefit of Martin. In our view no legal rights of the defendant have been unjustly prejudiced by the acts of the plaintiff.

In support of their contentions counsel for the defendant cite the following cases: The Chicago Title & Trust Company v. The Central Trust Company, 312 Ill., 396, 457; Halsted v. Griesen, 173 Ill. App. 551, 557. We do not think that the cases are applicable

testimony is not sufficient.

It is not clear from the testimony of the witness that the

defendant, as it was stated that the defendant was not a party

to it until the defendant had been charged with a conspiracy

against the U. S. Marine and Company. He was unable to testify that

there was any other case in the circumstances. In my opinion there

is no evidence from which it could be inferred that the plaintiff owed

the defendant any duty. The plaintiff cannot be held liable

because that was a duty which was owed to the plaintiff and not to the

defendant. The plaintiff is not entitled to recover from the defendant

but it has been held by the court in the case of the plaintiff of

the defendant, but although such a question had arisen, it does not

follow that the plaintiff was under a duty to the defendant. The plaintiff

that the plaintiff had opened a separate account with U. S. Marine and

Company. There is no evidence from which it could be inferred that

the plaintiff was under a duty to the defendant. The plaintiff is not

entitled to recover from the defendant upon the plaintiff's claim

for damages in regard to the actions of Marine. From the facts

that the defendant was in the course of a conspiracy for Marine,

therefore it would be assumed that the defendant would keep in

touch with the defendant and within the meaning of the defendant's

contract with the plaintiff.

It is not understood why the defendant should not keep in

touch with the plaintiff in regard to the account with the

defendant, especially in view of the fact that the account was

opened for the benefit of Marine. In my view no legal relation of the

defendant to the plaintiff is established by the facts of the case.

The court is not satisfied that the defendant is not liable

for the damages claimed. The plaintiff is entitled to recover

to the case at bar. In the case of The Chicago Title & Trust Company v. The Central Trust Company, supra, the court held the debtor has the right to have his payment applied to the debt as he directs; and that if the proof shows that the debtor made no such direction, then the creditor may apply the credit as he sees fit, in case no third party is unjustly prejudiced. In the case at bar no such questions are presented as there were two debtors each with a separate account. In the case of Halstead v. Wilson, supra, it was held that after a payment has once been applied, it cannot be changed without the consent of the parties. In that case there were two accounts but only one debtor.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

Matchett, F. J., and McCurely, J., concur.

STELLA V. HEALEY, Administratrix
of the Estate of EDWARD J. HEALEY,
Deceased,

Appellee,

vs.

LEROY F. SULLIVAN,

Appellant.

241 I.A. 620

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Leroy F. Sullivan, the defendant, from a judgment in favor of the plaintiff, Stella V. Healey, administratrix of the estate of Edward J. Healey, deceased, in an action in the Municipal court of the City of Chicago, brought by the plaintiff on a promissory note executed by the defendant and payable to Edward J. Healey, deceased.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of \$6423.68.

The note, which was dated April 28, 1919, was for \$5,000, payable three years after date with interest at the rate of five per cent per annum. Edward J. Healey died August 29, 1922. The defense of the defendant is stated as follows in his affidavit of merits:

"Defendant says that during the year 1919 he contemplated constructing a building to be used as an automobile salesroom to be located at the premises commonly known as No. 4761 West Washington boulevard, Chicago, Illinois; that in order to acquire sufficient money to construct said building it was necessary for this defendant to procure a building loan of at least \$40,000 on the premises aforesaid; that before a loan of such an amount could be procured it would be first necessary to satisfy the prospective bond company about to make said loan that the vacant ground upon which said contemplated building was to be erected had a value of not less than \$15,000; that this defendant had, in January, 1919, entered into a contract with the owners of said above described vacant property to purchase the same for the sum of \$10,000; that believing the vacant land in question to be of the value of at least \$15,000 this defendant believed that he had a right to represent that

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1. *Journal of the American Medical Association*, 1990; 263: 1025-1028.

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There is a difference in the way that the two groups of people view the world. The first group of people, the "materialists," believe that the world is made of matter and that everything is made of atoms and molecules. The second group of people, the "idealists," believe that the world is made of ideas and that everything is made of thoughts and feelings.

of all proposed changes to ensure the system was to remain viable.

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page numbers of 1941 in list of fully indexed journals 127

said land was of the value of \$18,000 to any bond company interested in making said loan above mentioned; that this defendant fearing that inquiries might be made as to how this defendant became possessed of sufficient money to pay for said vacant land aforesaid, conceived the idea of stating, in case he was interrogated on this point, that he had borrowed the sum of \$5,000 from one Edward J. Healey, now deceased, who was an uncle of this defendant, and that he had given said Edward J. Healey his promissory note for said amount as evidence of said indebtedness; that in order that said Edward J. Healey might be in a position to exhibit said note to any bond company who might investigate said proposed loan of \$40,000 minutely, and who might make inquiry of said Edward J. Healey, deceased, and ask to see said note of \$5,000, this defendant executed and delivered to said Edward J. Healey a promissory note in the words and figures following, to-wit:

'\$5000.00 Chicago, April 28th, 1919.
Three Years after date I promise to pay to the order of Edward J. Healey Five Thousand and no/100 Dollars at----
Value received with interest at the rate of 5 per cent per annum.
LeRoy W. Sullivan.
No.....Due April 28th, 1922.'

This defendant further says that while said note recites that value was received, the true fact is that no money or any consideration of any kind or nature whatsoever was ever given by the said Edward J. Healey or any other person whomsoever, to this defendant nor did this defendant ever receive any consideration of any kind or nature whatsoever from said Edward J. Healey, or any other person for the execution of said note; that at the time when said note was given by this defendant to said Edward J. Healey, deceased, it was then and there agreed by and between said Edward J. Healey and this defendant that the said Edward J. Healey would surrender up to this defendant the said note above described at any time that he should be requested so to do by this defendant. This defendant further says that in 1919 he acquired title to said vacant premises above described and was successful in procuring a building loan of \$40,000 on said property and finished the construction of an automobile sales and show room building on said premises during the year 1919; that thereafter, believing no further necessity existed for the said Edward J. Healey to continue to hold and possess the said note hereinabove described this defendant approached the said Edward J. Healey and requested him to surrender the said note to this defendant in accordance with his agreement as hereinabove set forth; that the said Edward J. Healey then and there represented to this defendant that he had long before destroyed said note, believing that the procuring of the \$40,000 building loan and the completion of the construction of the building made the preservation of the note no longer necessary and that by reason of his act in destroying said note he was unable to surrender the same to this defendant; that this defendant believing said representations made by the said Edward J. Healey to the effect that said note had been destroyed and was no longer in existence to be true and having no knowledge to the contrary made no further inquiry regarding the same. This defendant further says that there never was any considera-

tion of any kind or nature whatsoever for the giving of said promissory note aforesaid and that he is entitled to have said note declared null and void and delivered up and cancelled and nullified in accordance with the agreement which the defendant had with said deceased. Wherefore this defendant says that he is not indebted to the plaintiff in any sum whatsoever."

The principal assignments of error urged by the defendant are that the verdict is against the weight of the evidence; and that the court erred in not granting a new trial on the ground of newly discovered evidence.

The only evidence introduced on behalf of the plaintiff was the testimony of the plaintiff herself. Her testimony related to the manner in which she came into the possession of the note. There are contradictions in her testimony. She testified that she saw the note in Healey's pocketbook several weeks before he died; that she found the note in his pocketbook just the day before he died; that she found the note in his pocketbook the day after he died; that the first time that she saw the note was the day after his death. The fact remains, however, that according to her testimony Healey was carrying the note in his pocketbook just before his death, although the note had been given him by the defendant three years before. The significance of this fact appears when it is considered in connection with the testimony of Harry P. Klassen, who testified on behalf of the defendant that Healey told him about five days before his death that he had a note for \$5000 which belonged to the defendant, and that he was going over to see the defendant.

The defendant was disqualified by statute from testifying as to the transaction in regard to the note between him and Healey. But the evidence introduced on behalf of the defendant tends strongly to support the allegations in his affidavit of merits. The following letter which the defendant wrote to Healey on May 24, 1919, was admitted in evidence:

It was found that the majority of the respondents were male, with a significant portion being in the 18-24 age group. The data also indicated that the respondents were primarily from the urban areas, with a smaller proportion from rural areas. The findings suggest that the majority of the respondents were likely to be students or young professionals, given the age distribution and the urban/rural split.

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and that the new law is not granting a new trial on the ground

that the new rate in Russia's postwar period was set at 10% per annum in order to ensure the success of the war effort. There are no other sources in the country.

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doi:10.1017/S0022292414000063 Published online by Cambridge University Press

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"Dear Edward:

The following is an enumeration of the facts as I related them to you over the wire. Location of property Southwest corner 47th Avenue and Washington Boulevard, cost \$12,500.00. Amount furnished by you \$5000.00 three years and you are willing to extend it if necessary. Name of loan people, Cooper & Faraley, either one of whom may call you up; amount they are furnishing is \$40,000.00 for the erection of the building, nature of business to be conducted on premises - selling automobiles. Your taking a promissory note rather than a judgment note, explain by saying that through your belief in my ability and your knowledge of me as a business man who has succeeded with his purposes in the past, coupled with the relation that you held towards my wife whom you are very fond of, that the question of more substantial security was secondary with you. Now, Ed, I am depending upon you to acquit yourself with honor if called upon in any way that you can do it. Time necessitates that I be brief. Would like to tell you all about it when I see you. Thanks very much and best regards from me.

Roy."

The evidence on behalf of the defendant showed that about four days before Healey's death Healey told Klassen that the doctor had told him that he, Healey, did not have long to live; that he, Healey, told Klassen that he, Healey, had something he ought to take care of at once; that he had a note for \$5,000 made by the defendant, but that the defendant did not owe him anything; that he intended to give the note to the defendant the first time he saw him, or he might mail it to him. The evidence on behalf of the defendant further showed that Healey had a safety deposit box in the First National Bank, in which he kept his valuables; that at the time of his death the note was not there but was in his pocket; that at the time that the note was executed Healey's bank deposits averaged only about \$1700; that at the time of Healey's death he had on deposit in banks \$12,392.01, but this was three years after the time when the note was executed; that the plaintiff had destroyed all of Healey's books and papers and could not produce Healey's bank books, cancelled checks or check stubs.

There is nothing in the evidence to show that Healey ever paid to the defendant \$5000 by check or otherwise.

We are of the opinion that the verdict is manifestly against the weight of the evidence.

In this view it will not be necessary to decide the question whether the motion for the new trial on the ground of newly discovered evidence should have been granted.

Counsel for the plaintiff contends that "courts will not entertain a defense of this kind;" that "when two parties conspire together to defraud a third the general rule is that courts will not aid either of them to recover upon an agreement founded upon fraud, but will leave them where they put themselves;" that "the rule is usually expressed in the legal maxim 'in pari delicto melior est conditio defendantis.'"

The defendant is not seeking to defeat the action of the plaintiff on the ground that the transaction was fraudulent. The defense of the defendant is that there was no consideration for the note. But it is not necessary to decide the questions whether there was a conspiracy to defraud, and if so the effect of such conspiracy in regard to the defense of the defendant, as the plaintiff has not saved these questions for review. The record does not show that the plaintiff raised the questions in any manner in the trial court, either by the pleadings, objections to the evidence or otherwise. No cross error has been assigned by counsel for the plaintiff, and none could be assigned, as there has been no ruling of the trial court on the questions.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, F. J., and McSurely, J., concur.

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20 August 1968

„Zusammen mit dem Ministerium ist eine Kommission zur Klärung der Verhältnisse im Entstehen.“

The history of the railroad is less than an hour's ride.

Journal of Management Education 33(1) 1-12

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RECEIVED: 15 JULY 1998; REVISED: 15 JULY 1998; ACCEPTED: 15 JULY 1998

WILLIAM J. MURPHY,
Appellee,

vs.

NICHOLAS R. FINN, EDWARD J. EVANS,
and JOHN A. FELKA, as Civil Service
Commissioners of the City of Chicago,
Appellants.

241 I.A. 620

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a petition for a writ of certiorari brought in the Superior court of Cook county by William J. Murphy against Nicholas R. Finn, Edward J. Davis and John A. Felka, as Civil Service Commissioners, to quash the record of the Civil Service Commission in the proceedings wherein the petitioner was discharged from the position of patrolman in the department of police of the City of Chicago.

The respondents demurred to the petition. The court over-ruled the demurrer and issued the writ of certiorari directing the respondents to certify to the court the record of the proceedings before the Civil Service Commission. On the return of the writ with the record of the proceedings the respondents made a motion to quash the writ, and the petitioner moved to quash the proceedings of the Civil Service Commission. The court over-ruled the motion of the respondents, and granted the motion of the petitioner. From the order of the court the respondents have prosecuted this appeal. The return of the respondents is as follows:

"First: That on May 12, 1922, charges against the petitioner, William J. Murphy, were preferred by Charles C. Fitzmaurice, as Superintendent of Police of the City of Chicago, together with specifications of particular acts and conduct constituting the respective violations charged, which charges and specifications are hereinafter fully set out as part of the record and return in this cause, and said charges and specifications were filed with the respondent, Civil Service Commission

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of Chicago. Second: That the respondent caused to be issued upon said charges so preferred and filed before it a written form of notice directed to said petitioner, William J. Murphy, commanding him to be and appear before the respondent in Room 612 City Hall, on the 24th day of May, A. D. 1922, at 1 o'clock p. m. to answer and defend against said charges; that a copy of such charges was made to accompany said notice; that said petitioner, William J. Murphy, was on the 17th day of May, 1922, duly served with said notice by having a copy thereof delivered to him, that said notice issued by the respondent and proof of service thereof on the petitioner are fully shown by the record in this cause hereinafter set out as part of the record and return herein. Third: That to sustain the charges aforesaid, the respondent heard the testimony of the witnesses in connection with the charges filed, a true, full and complete transcript of which is incorporated in the record of the Commissioner hereinafter set out in this return as part thereof. Fourth: That the following is a true, full and complete transcript of the record of said proceedings affecting this petitioner, certified by the Secretary of the Respondent, to-wit: "

Here are set out the copy of the notice to the petitioner, the receipt of the petitioner of the notice, the affidavit of service of the notice on the petitioner, the charges filed with the Civil Service Commission against the petitioner, the list of the witnesses, the findings and decision of the Civil Service Commission, the order of discharge of the petitioner, the statement that a rehearing was allowed upon the request of the Superintendent of Police and that reinstatement of the petitioner was denied.

The finding of the Civil Service Commission was as follows:

"In the matter of the investigation of certain charges against William J. Murphy, the Civil Service Commission now here finds that said charges were made in writing and filed with the Civil Service Commission on the 15th day of May, 1922; that said charges came on for hearing and investigation before the Civil Service Commission on the 24th day of May, 1922, and again on the 7th day of June, 1922; that a notice stating the time when and the place where this investigation was to be held, together with a copy of said charges, was delivered to the said William J. Murphy on the 17th day of May, 1922; that the said William J. Murphy was not present in person or by counsel at said investigation; that the witnesses were sworn and testified under oath. And the Civil Service Commission having heard all the evidence adduced and being fully advised in the premises, now here finds from said evidence the facts to be as follows: That the said William J. Murphy engaged in an altercation with one Pete Vredelyak and one Mike Brsetich, and that said William J. Murphy shot the said Mike Brsetich, and the said shooting being unwarranted; that Acting Lieutenant Daniel Brown testified that the said William J. Murphy was intoxicated at the

time of the shooting. Wherefore the Civil Service Commission finds that the said William J. Murphy is guilty of the charges following: Intoxication; and it is hereby ordered that the said William J. Murphy be discharged from the Police Department and from the City of Chicago."

From an inspection of the record of the Civil Service Commission we are of the opinion that the Civil Service Commission had jurisdiction of the petitioner and of the subject matter, and that the Civil Service Commission did not exceed its jurisdiction or otherwise proceed in violation of law.

In this state of the record the motion of the petitioner to quash the record of the Civil Service Commission should have been denied, and the motion of the respondents to quash the writ of certiorari should have been allowed. Funkhouser v. Coffin, 301 Ill., 257, 260.

The order of the trial court is reversed.

ORDER REVERSED.

Mathett, P. J., and McSurely, J., concur.

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

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Journal of Management Education 30(6)

4. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler (1987).

CHICAGO TITLE & TRUST COMPANY,
as Trustee, and R. POSNER,
Appellees,

vs.

EARL H. JOICE, ELSIE C. ROWALT
and H. E. ROWALT,
Appellants.

241 I.A. 620
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit brought by the Chicago Title and Trust Company, as trustee, and R. Posner, the complainants, to foreclose a trust deed executed by Earl H. Joice, one of the defendants, to secure his note for \$2000. The bill of complaint alleges that Elsie C. Rowalt and H. E. Rowalt have or claim some interest in the mortgaged premises. Joice failed to appear and was defaulted. Elsie C. Rowalt and H. E. Rowalt filed separate answers. Elsie C. Rowalt alleged that she acquired title to the premises from Joice by warranty deed. H. E. Rowalt averred that his only interest in the premises "is that of inchoate dower."

The cause was referred to a master to take testimony and report his conclusions. The master found in favor of the complainants. The court entered a decree in accordance with the findings of the master. From the decree the defendants Elsie C. Rowalt and H. E. Rowalt have prosecuted this appeal.

The defendants contend that Posner is not the legal holder and owner of the note. The note and trust deed were introduced in evidence by the complainants, and Ernest W. Clark, on behalf of the complainants, testified that Posner was the owner of the note. This proof made a prima facie case for the complainants and the burden was upon the defendants to show a valid defense.

Boudinet v. Winter, 91 Ill. App. 106, 108. No evidence was introduced on the part of the defendants to overcome the prima facie

341 L. A. 650

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY

EDWARD J. KELLY, Plaintiff,
vs.
JOHN J. KELLY, Defendant.

JOHN J. KELLY, Plaintiff,
vs.
EDWARD J. KELLY, Defendant.

IN SENATE, JANUARY 1, 1908.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE.

The report of the Commissioners of the Land Office, dated January 1, 1908, contains a report on the land owned by the State of Illinois, and on the land owned by the United States. The report contains a list of the land owned by the State of Illinois, and a list of the land owned by the United States. The report also contains a description of the land owned by the State of Illinois, and a description of the land owned by the United States.

The report also contains a description of the land owned by the State of Illinois, and a description of the land owned by the United States. The report also contains a description of the land owned by the State of Illinois, and a description of the land owned by the United States. The report also contains a description of the land owned by the State of Illinois, and a description of the land owned by the United States.

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case of the complainants, but counsel for the defendants contends that the testimony of Clark is inherently improbable. We do not agree with counsel for the defendants.

Counsel for the defendants further contends that Joice did not receive any consideration for the note and trust deed; that he had no interest in the property and was merely acting as a dummy.

We do not think that the defendants are in a position to raise the question of want of consideration. In their answers as originally filed they do not allege want of consideration. It was not until the day that the decree of the court was entered that they amended their answers by alleging want of consideration. But the record does not show, as far as we are able to discover, that they made a motion to refer the cause to the master to take proof on the issue of want of consideration. However, aside from this question the evidence shows that Elsie C. Rowalt in her warranty deed expressly assumed the mortgage and agreed to pay it. The evidence also shows that the interest on the mortgage was paid, and that when the note matured H. E. Rowalt paid \$70 on the note; that he asked for an extension of time to pay the balance; and that he said that he understood that the trust deed had a year to run.

Counsel for the defendants maintains that the evidence does not show that the trust deed assumed in the warranty deed by Elsie C. Rowalt was the same trust deed as the one which complainants are seeking to foreclose; that the warranty deed was executed on August 2, 1921, and that the note and trust deed were executed on September 2, 1921. It is true that the trust deed which Elsie C. Rowalt assumed in the warranty deed is referred to in the deed as being of the date of August 2, 1921, but from the pleadings and the evidence it is apparent that the trust deed sought to be foreclosed is the one that was assumed by Elsie C. Rowalt. It is the trust deed

case of the defendant, but counsel for the defendant contends
that the testimony of Clark is inherently incredible. He does not

agree with counsel for the defendant.

Counsel for the defendant further contends that Clark

is not entitled any consideration for the note and trust deed; that
he has no interest in the property and was merely acting as a dummy.

We do not think that the defendant is in a position to

raise the question of want of consideration. In their answers as

affirmatively filed they do not allege want of consideration. It was

not until the day that the decree of the court was entered that they

submitted their answers by alleging want of consideration. But the

record does not show, as far as we are able to discover, that they

made a motion to set aside the decree for the reason that Clark was

not at that time of consideration. They, with their motion

submitted their answers and asked to pay it. The defendant also shows

that the interest on the mortgage was paid, and that when the

debtor, W. E. Howell, paid \$50 on the note; that he asked for an

order of time to pay the balance; and that he said that he understood

that the trust deed had a good to him.

Counsel for the defendant maintains that the defendant

was not when Clark the trust deed entered in the county deed book.

Clark E. Howell was the same trust deed as the one which plaintiff

was entitled to foreclose; that the defendant's deed was recorded on

August 1, 1913, and that the note and trust deed were executed on

September 1, 1913. It is also that the trust deed which Clark E.

Howell executed in the county deed book is identical with the

deed of the Clark E. Howell, but that the plaintiff and the

defendant is at variance that the trust deed which is now foreclosed

is the one that was executed by Clark E. Howell. It is the trust deed

on which the interest was paid and on which H. E. Rowalt paid \$70 and asked for an extension of time in which to pay the balance. But counsel for the defendants contends that Elsie C. Rowalt was not bound by the actions of H. E. Rowalt. We are of the opinion that the fair inference from the record is that H. E. Rowalt was acting principally for Elsie C. Rowalt. He alleged in his answer that he had only an "inchoate dower" right. The evidence does not show that he was the husband of Elsie C. Rowalt, but it does appear circumstantially that his negotiations in regard to the note and mortgage were conducted on her behalf. Neither Elsie C. Rowalt nor H. E. Rowalt testified.

Counsel for the defendants have cited numerous authorities in support of their contentions, but in our view the authorities are not applicable to the case at bar.

Counsel for the defendants contend that the master erred in refusing to admit competent and relevant evidence. This objection cannot be considered for the reason that the record does not show that the defendants made application to the court to require the master to admit the evidence. Dickinson v. Torrey, 91 Ill. App. 297, 304.

We are of the opinion that the defendants have not established a valid defense. The decree is affirmed.

AFFIRMED.

Hatchett, P. J., and McMuraly, J., concur.

LAWRENCE M. HARGIS, (Plaintiff),
Appellee,

vs.

SAMUEL McCALLLEN and CHARLES E. MALE,
Doing Business as Mechanical Specialties
Mfg. Co. (Defendants),

SAMUEL McCALLLEN,
Appellant.

241 I.A. 620

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Samuel McCallen from a judgment in an action brought in the Municipal court of the City of Chicago by Lawrence M. Hargis, the plaintiff, against Samuel McCallen and Charles E. Male, doing business as Mechanical Specialties Manufacturing Company.

The plaintiff, Lawrence M. Hargis, prosecuted an appeal to this court in the same proceeding, from an order of the trial court denying the motion of the plaintiff to vacate the judgment and to dismiss the cause. On the appeal of the plaintiff, Hargis, No. 30446, we held that the trial court erred in denying the motion of the plaintiff, and that the order of the court should be reversed and the cause remanded. On the present appeal of Samuel McCallen, we are of the opinion that the judgment of the trial court should be reversed and the cause remanded with directions to the trial court to grant the motion of the plaintiff to set aside the judgment and dismiss the cause.

REVERSED AND REMANDED
WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

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JOHN P. DUKE et al.,
Appellees,

vs.

HERMAN JUHNKE, Jr.,
Appellant.

241 I.A. 620
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, Herman Juhnke, Jr., from a judgment against him of \$631.30.

This case was consolidated for hearing with Duke, Supervisor. v. Olson, No. 30596, in which an opinion has been filed this day. Our conclusion in that case controls our conclusion in the instant case, and for the reasons stated in that opinion this judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

241 I.A. 620

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

of Appellate

vs.

Appellate

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, Herman J. Jones, Jr.,

from a judgment against him of \$25.00.

This case was consolidated for hearing with Index.

Wright v. Jones, No. 20888, in which an opinion has been

filed this day. Our conclusion in that case controls our con-

clusion in the instant case, and for the reasons stated in that

opinion this judgment is affirmed.

APPROVED.

Witness, P. J., and Johnston, J., court.

336 - 30598

JOHN P. DUKE et al.,
Appellees,

vs.

HERMAN JUHNKE,
Appellant.

241 I.A. 620

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MOSUNELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, Herman Juhnke,
from a judgment against him of \$3156.20.

This case was consolidated for hearing with
Duke, Supervisor, v. Olson, No. 30596, in which an opinion
has been filed this day. Our conclusion in that case controls
our conclusion in the instant case, and for the reasons stated
in that opinion this judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnson, J., concur.

335 - 3028

2411 A. 620

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

JOHN P. DINEY et al.,
Appellants,
vs.
HERMAN J. JONES,
Appellee.

MR. JUSTICE ROBERTSON delivered the opinion of the court.

This is an appeal by defendant, Herman Jones,

from a judgment against him of \$1100.00.

This case was consolidated for hearing with

John P. Diney v. Jones, No. 3028, in which an opinion

was given this day. Our conclusion in that case controls

our conclusion in the instant case, and for the reasons stated

in that opinion this judgment is affirmed.

THE COURT.

Witness my hand and seal of office at Chicago, Illinois, this 11th day of June, 1911.

JONAS P. DUKE et al.,
Appellees,
vs.
WILLIAM C. JUHNKE,
Appellant.

241 I.A. 620
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, William C. Juhnke, from a judgment against him of \$631.20.

This case was consolidated for hearing with Duke, Supervisor, v. Olson, No. 30596, in which an opinion has been filed this day. Our conclusion in that case controls our conclusion in the instant case, and for the reasons stated in that opinion this judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

This is an appeal by Jacques and his wife, William J. Jacques, Jr.

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PEOPLE OF THE STATE OF ILLINOIS
 ex rel. ROBERT WATERS,
 Appellee,
 vs.
 NICHOLAS B. FINN et al.,
 Appellants.

241 I.A. 621
 APPEAL FROM SUPERIOR COURT
 OF COOK COUNTY.

MR. JUSTICE ROSENBERG DELIVERED THE OPINION OF THE COURT.

Petition for mandamus was opposed by a general demurrer which was over-ruled, and judgment followed awarding petitioner the writ commanding the Fire Commissioner of the Fire Department of the City of Chicago to give notice to the Civil Service Commissioners of the vacancies in the offices, positions and places of employment of fire engineer and of assistant fire engineer and commanding the Civil Service Commissioners of the City of Chicago to certify names on the reinstatement list and the Fire Commissioner to appoint said persons whose names are certified and the said Civil Service Commissioners to give notice of and hold examinations for fire engineer and for assistant fire engineer, all as prayed in the petition. Defendants appeal.

A condensed statement of the petition is that petitioner is a citizen and a licensed engineer; that he wished to take the civil service examinations for assistant fire engineer of the Fire Department of the City of Chicago, which is the lowest class in the service in that department and which position is filled by an original examination; that there were no eligible lists of applicants for that position or the next above, that of fire engineer, which is filled by a promotional examination, to which incumbents of the position of assistant fire engineer are eligible; that there was what is known as a reinstatement list on which were placed the names of persons returned from leave of absence or laid off or

who had resigned and whose resignations were withdrawn; that on such reinstatement list for assistant fire engineer there were four such persons, only one of whom would accept reinstatement, and on such list for fire engineer there was one person who had signified that he would not seek reappointment; that the City by its annual appropriation bill provided for 161 fire engineers and 145 assistant fire engineers, and that there were five vacancies in each position; that the vacancies in the position of fire engineer must be filled by promotion from the class of assistant fire engineer, so that when these vacancies were filled there will be ten vacancies in the position of assistant fire engineer; that the Civil Service Commissioners refused to hold examinations for either of these positions and the Fire Commissioner refused to report or make requisition for names of eligibles to fill the vacancies.

It is argued against the judgment that it is not shown that vacancies exist in the offices of fire engineer and assistant fire engineer. The petition so alleges, and an allegation that there was a vacancy is a statement of an ultimate fact, which a general demurrer admits. People ex rel. Blaghty v. Coffin, 279 Ill. 466; Kosh v. Arnold, 242 Ill., 210.

It was held in Bullis v. City, 235 Ill., 472, that the office of police officer could not be created by an appropriation bill, but the petition here does not allege that the fire engineers or assistant fire engineers were officers, but that these were offices, positions or places of employment and these positions can be created by an appropriation bill. People ex rel. Jacobs v. Coffin, 282 Ill. 599. The difference between an officer and an employee in a position is determined in this case.

If, then, these positions have been created by the act of the City Council and there are vacancies therein, neither the Fire Commissioner nor the Civil Service Commissioners have power to

...and resigned and whose resignation was withdrawn; that on such
reinstatement list the assistant fire engineers there were then such
engineers; only one of whom would accept reinstatement, and on such list
the fire engineers there are not proper and not eligible to be
and such reinstatement; that the City by its annual reorganization bill
provided for 102 fire engineers and 125 assistant fire engineers, and
that there were five vacancies in each position; that the vacancies in
each position of the engineers must be filled by promotion from the
class of assistant fire engineers, so that when those vacancies were
filled there will be ten vacancies in the position of assistant fire
engineers; that the Civil Service Board requires payment to hold ex-
isting positions in either of those positions and the fire department
cannot to recruit or make replacement for same as eligible to fill
the vacancies.

It is argued against the plaintiff that it is not shown
that plaintiff filed the application on time and that plaintiff
was not eligible. The plaintiff in answer, and in opposition to the
defendant's motion, has shown that it is eligible to fill the
positions and that it is eligible to fill the positions.

It was held in Smith v. City of Chicago, 1901, 170 Ill. 101, that the
right to hold office could not be created by an appropriation
bill, but the position must first be created by the fire engineers
or assistant fire engineers were all cases, but that there were
vacancies on ground of engineers and those positions can
be created by an appropriation bill. People v. City of Chicago, 1901, 170 Ill. 101.

The difference between an officer and an employee in a
position is not material in this case.

It is, then, those positions have been created by the city
and the City Council and there are vacancies therein, and the
Civil Service Board requires payment to hold existing positions and the
fire department cannot to recruit or make replacement for same as eligible to fill the vacancies.

decide whether or not it is necessary to fill these positions. They cannot abolish a position which the City Council has created by refusing to take the proper steps required by law to fill any vacancies. This has been definitely decided in People ex rel. Frederick v. City of Chicago, 283 Ill., 462; People ex rel. Akin v. Kipley, 171 Ill., 44; People ex rel. Williams v. Errant, 229 Ill., 67.

It is said that there is no reinstatement list provided by law or under the rules of the Civil Service Commission for the reinstatement of resigned officers and employees. It might be noted that the petition does not allege that those on the reinstatement list are resigned employees, but this is immaterial, for petitioner does not claim to be a resigned employee, but is claiming the right to take an original examination.

It is also argued that petitioner does not show that he possessed the qualifications as to age, height, weight, etc., to take the examinations, which are required by certain rules of the Civil Service Commission. We cannot take judicial notice of such rules, and they are not in the record before us. People ex rel. Blachly v. Coffin, 379 Ill., 405.

The points raised by defendants have already been decided adversely to their position by the Supreme Court in similar cases. The demurrer was properly over-ruled and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

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1. The first question is whether the defendant is a "person" within the meaning of the statute. The court has held that a corporation is a "person" for the purposes of the statute. The defendant is a corporation, and therefore a "person" within the meaning of the statute.

The United States for the purpose of the present case is limited to the fact that the United States is not a party to the present case. The United States is not a party to the present case.

1. *Chrysomelidae* (Coleoptera) (18 specimens)

R. D. LEBBERS, Individually
and as Trustee,

Appellee,

vs.

FRANK JEDLICKA et al.,

Appellants.

241 I.A. 621

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE ROSENBERG DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill seeking foreclosure of a trust deed. Defendants answered, and the cause was referred to a Master, who heard evidence and reported his findings with the recommendation that the prayer of the bill be granted. Exceptions were over-ruled and a decree entered accordingly, fixing the indebtedness of the defendants at \$32,430. Defendants have appealed.

There is merit in the suggestion that the appeal should be dismissed for the reason that the brief of defendants does not comply with Rule 19 of this court. However, we prefer to pass upon the points presented in the brief as we understand them.

The complainant sold the real estate in question to the defendants for \$33,000, and as part of the purchase price took a trust deed dated June 1, 1922, conveying the property, to secure defendants' \$30,000 note, payable in installments of \$2,000 each on June 1st of each year thereafter until paid. The interest was 6%, due semi-annually. The interest due December 1, 1922, and June 1, 1923, was paid, but the installment of \$2,000 of principal due June 1, 1923, was not paid.

Defendants assert that there was a verbal agreement to extend the time of payment of this installment. To support

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this, defendant Albert F. Jedlicka testified that he had a conversation with complainant in May, 1923, in which he told complainant that the defendants expected to buy other property and would put a large bond issue on all of this and pay the entire \$30,000 the following December, and that complainant agreed to this; that thereupon the interest due June 1, 1923, was paid by check, on which was an endorsement to the effect that the \$2,000 then due was to be paid on or before December 1, 1923; that complainant continued to occupy an office in the building he had sold to defendants, and that part of the consideration for the extension was defendants' agreement not to press him to pay rent for this until December 1st. Complainant denied that he ever had any such conversation with Albert Jedlicka, and testified that he had paid all the rent, and this is admitted by defendants. Complainant also testified that there was no endorsement on the check to the effect that the \$2,000 of principal might be paid on or before December 1st, and that he never knew of any such notation until the check was produced at the hearing before the Master. Jedlicka admits that the check and endorsement may have been written with two pens using two different kinds of ink. Complainant further testified that he demanded payment of this \$2,000 installment every time he met defendant Albert F. Jedlicka, which was at least eight times, and defendant admits this, but says that eighty times would be more like it. Jedlicka also admits that he received a letter from the Western State Bank about June 27, 1923, and another about September 25th, in both of which it was stated that foreclosure proceedings would be commenced if the installment of principal was not paid. Complainant testified that he told defendant Albert F. Jedlicka that this bank was collecting the note for him, and the defendant stated that "these fellows *** could not do anything for a couple

...that the defendant suggested to buy other property and would not a
large bond issue on all of this and pay the entire \$20,000 the
following December, and that complaint agreed to this; that
throughout the interest due June 1, 1925, was paid by check, on
which was an endorsement to the effect that the \$2,000 then due
was to be paid on or before December 1, 1925; that complaint
agreed to occupy an office in the building he had sold to de-
fendant, and that part of the consideration for the extension
was defendant's agreement not to give him any more in this
matter. Complaint denied that he ever had any such
communication with Albert J. Jellison, and testified that he had paid
all the rent, and this is admitted by defendant. Complaint
also testified that there was no endorsement on the check to the
effect that the \$2,000 of principal might be paid on or before
December 1st, and that he never knew of any such notation until
the case was produced at the hearing before the Master. Jellison
admits that the check and endorsement may have been written with
the purpose of raising two different kinds of law. Complaint further tes-
tified that he demanded payment of this \$2,000 installment every time
he met defendant Albert J. Jellison, which was at least eight times,
and defendant admits this, but says that eight times would be more
than six. Jellison also admits that he received a letter from the bank
on June 1st about June 27, 1925, and another about December 28th,
in both of which it was stated that foreclosure proceedings would
be commenced if the installment of principal was not paid. Com-
plaint testified that he told defendant Albert J. Jellison that
the bank was collecting the note for him, and the defendant
admits that "these fellows" could not do anything for a couple

of years anyway," and at another time commented on one of these letters as being useless, as foreclosure proceedings would take "a couple of years." Examining the statement of Jedlicka it is apparent that there was no definite plan to purchase other property, but only a possible intention to do so, and "if it looks easy" defendants would pay off the mortgage on December 1st.

The master found that there was no valid agreement for an extension of payment of this installment of principal. The evidence justifies the conclusion that there was in fact no agreement made and even if the defendants' version should be accepted, the alleged agreement was wholly without consideration and therefore not binding. A promise by the holder of a note to forbear is not binding unless supported by a consideration and such agreement does not prevent the holder from suing ^{on} the paper at any time. 7 Cyc, 399. This has been held in many cases from Waters v. Simpson, 7 Ill. 570, to Hayer v. Wolfe, 236 Ill. App. 435.

It is also contended by defendants that they tendered the installment due June 1, 1923, before the foreclosure proceedings were commenced. This is not supported by the record. Complainant after making numerous demands for payment of the installment, on October 19, 1923, delivered the trust deed and notes to his attorney with instructions to foreclose and the bill for this purpose was filed October 22nd. On that date defendant Jedlicka offered complainant a check, which complainant refused, informing defendant Jedlicka that the matter had been placed in the hands of his attorney for foreclosure and that the entire amount secured by the trust deed must be paid. Whether this check was offered before or after the exact minute on which the bill was filed is uncertain, but this is unimportant, as the tender of a check is not a sufficient tender. The fact that defendants some days after

the bill was filed made a tender of \$2,000 in cash will not avail, for the filing of the bill was evidence of complainant's election to declare the entire amount due according to the terms of the trust deed. Complainant's testimony that on October 22nd defendants offered a check and not cash is supported by the testimony of Mr. Tourak, an attorney who had theretofore represented complainant, who testified that Jedlicka telephoned him on this date, saying that he had been at complainant's office a few minutes before and offered him a check, which was refused. There was no tender of payment which would bar complainant from exercising the option given in the trust deed, upon default of any of the installments of principal or interest for thirty days, to declare due the principal sum without notice.

It is stated that the Master's fees are excessive, but no particulars are given and no suggestion as to any excessive items or charges is made.

A decree in chancery is such as the nature of the case, the law and the facts demand, not at the time of the inception of the litigation but at the time the decree is entered. Eaker v. Salzenstein, 314 Ill. 226; Kelly v. Galbraith, 166 Ill. 593. As we have said, the complainant sold the property to the defendants for \$33,000, receiving a little over \$1600 in cash and allowing defendants for taxes and other items made a credit of \$3,000; the balance of the purchase price was represented by defendants' note of \$30,000 secured by the trust deed. The decree was entered March 11, 1925, and before this date an installment of interest fell due on December 1, 1923; an installment of principal of \$2,000 and interest fell due on June 1, 1924; and another installment of interest became due on December 1, 1924. None of these was paid. The amount found due by the decree is nearly as much as the property was sold for. It would be inequitable in the highest degree to grant defendants' prayer to order the bill dismissed.

Complainant asks that damages be assessed against defendants on the ground that this appeal is prosecuted for delay. While there is some reason to believe this, we are not clearly convinced, and damages will not be assessed.

Upon the record before us no meritorious defense is presented and the decree is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

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241 I.A. 621

WILEY S. BOSIER,
Appellant,

vs.

JOHN C. BOWERS et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MCKENNEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of nil cariat entered upon a directed verdict in a suit for damages for a breach of contract of agency.

The declaration alleges that plaintiff owned a building in Evanston, Illinois, and being desirous of selling the same employed the defendants, real estate brokers, to sell his property and to use their best skill to secure a buyer at the highest price available; yet the defendants in violation of their agreement prevailed upon plaintiff to sell the property to one John Rowan for \$27,000, by falsely representing to plaintiff that this was the best price possible to obtain, whereas they then knew that they had a customer importuning them to secure for him a building for which he would pay \$37,000 or more, and that immediately upon securing plaintiff's signature to the contract for the sale of his property at \$27,000, defendants entered into negotiations with their prospect and forthwith sold the above property for the sum of \$37,000.00, which was \$10,000 more than the price plaintiff was induced to accept, wherefore plaintiff claimed damages in the sum of \$10,000.

At the conclusion of plaintiff's case the trial court apparently was of the opinion that plaintiff's evidence failed to support the allegations of his declaration and instructed the jury

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to find for the defendants. We are of the opinion that this conclusion is justified by the record.

The evidence tended to show that plaintiff telephoned to defendants that he wished to sell his property and in answer to an inquiry as to his lowest price told them that he wanted \$23,000 net, and the defendants promised to get the best price they could. Subsequently, John C. Bowers, a defendant, told him that they had sold the building and the best price they could get was \$27,500. A contract of sale was executed by plaintiff and John Rowan, the proposed purchaser, and subsequently the property was conveyed to Rowan for \$27,500. Thereafter plaintiff heard that this property had been sold by Rowan, and some months afterwards in an interview with Bowers was informed that a Mr. Petersen had acquired it. Petersen testified that he acquired this property by trade, giving in exchange a store and apartment building on Armitage avenue in Chicago. Plaintiff offered in evidence this contract of exchange, to which objection was made and sustained by the court. In this contract, which is in the record, the Evanston property was exchanged at the valuation of \$37,000. While there was some evidence touching the amount at which the property might be exchanged, there is no evidence whatever that it was sold to anyone or what its value would be on a sale. There was no evidence that plaintiff would have been willing to have taken Petersen's property in exchange for his, but rather to the contrary, for the plaintiff had stated that he wanted a residence and part cash, whereas Petersen's property was a store and two flats, and there is no evidence that Petersen paid any cash, although he did pay off a \$3500 mortgage on his property when he made the exchange with Rowan.

Plaintiff's property was sold to Rowan on June 14, 1921.

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The contract for the exchange between Petersen and Rowan was dated June 29, 1931. Petersen never saw the Evanston property which plaintiff had owned until June 30th, or six days after the contract between plaintiff and Rowan.

It is argued strongly on behalf of plaintiff that there was evidence which should have been submitted to the jury tending to show bad faith on the part of the defendants who were employed as agents for plaintiff. It might be conceded that the testimony indicated some circumstances which might possibly give rise to a suspicion that defendants were not as diligent as they might have been, but, in view of the fact that defendants secured a sale for very nearly the price placed by plaintiff on his property and his negative attitude towards any exchange which would not give him a residence and cash, the evidence as to bad faith does not amount to proof of the same.

In any event, the evidence that plaintiff's buyer subsequently made a trade for other property upon values adopted by the traders for the basis of the exchange does not tend to support the allegation of the declaration that the property was sold for a sum in excess of the price which plaintiff accepted.

Plaintiff attempts to make some point as to his right to recover commissions paid defendant, but there is no allegation in the declaration touching this, and no evidence to support any such claim.

In the absence of any evidence tending to support the allegations of the declaration, there was nothing to submit to the jury, and the court's action was proper and the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

THE PLATT & MUNK CO., Inc.,
a Corporation,
Appellant,
vs.
THE CHARLES T. POWNER CO.,
a Corporation,
Appellee.

241 I.A. 621
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on three notes for \$250 each, executed by defendant and delivered to plaintiff in payment for merchandise. Defendant filed a set-off, claiming damages on account of the failure of plaintiff to deliver all the merchandise contracted for. Upon trial by the court the finding was for the defendant on its set-off and damages were assessed against plaintiff in the sum of \$516.30. From the judgment thereon plaintiff appeals.

It is first asserted that the court had no jurisdiction, as the case was commenced as a case of the fourth class and the set-off should have been filed as a new suit in a first-class case. We do not agree with this. Defendant in its set-off claimed \$516.30 to be due from plaintiff, which was properly a fourth-class claim for less than \$1,000, and the court had jurisdiction.

The judgment, however, must be reversed for the reason that the court applied an improper measure of damages.

Plaintiff sold defendant 32 sets of second-hand metal printing plates for \$3500. Two thousand dollars was paid on delivery and the balance was evidenced by defendant's six notes, each for \$350. The first three were paid, but defendant refused to pay the other three for the reason that plaintiff had failed to deliver two sets of printing plates mentioned in the selling list, namely, one called "Alice In Wonderland" and the other "Black Beauty."

The evidence tends to show that plaintiff had previously acquired a lot of second-hand plates from other parties and was not aware at the time of the sale to defendant that these two sets of plates had been destroyed by fire some years before plaintiff had acquired the lot. When it developed that it was impossible to deliver these two sets, plaintiff offered to substitute other plates or to allow defendant the contract price for the same.

Upon the trial witnesses testified that there was no market price for second-hand plates of this kind; that they were well worn, would not make many impressions, and were sold slightly beyond junk prices. Defendant introduced evidence tending to show the cost of reproducing two new sets of these plates would be about \$1400. The trial court accepted this figure as defendant's damages, and deducting what it owed on its notes, gave it judgment for the difference, \$516.35.

As the plates had no market value, the usual rule that damages are to be estimated upon the difference between the contract price and the market price cannot be applied. There was no averment nor proof that these plates had any special or peculiar value because of any special purposes or uses which defendant contemplated which was communicated to plaintiff. In the absence of any allegation or proof of special damage, the rule is that the damages are such as can be fairly and reasonably considered as arising naturally from the breach of the contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Hadley v. Baxendale, 5 English Ruling Case 502; 3 R. C. L., p. 453; C. B. & Q. R. R. Co. v. Hale, 63 Ill. 360; North Chicago Street Ry. Co. v. Cotton, 41 Ill. App. 311; Produce Reporter Co. v. Adams Express Co., 176 Ill. App. 74.

There is force in the suggestion of the plaintiff's counsel that if plaintiff had failed to deliver one-half the

plates, upon the theory of damages followed by the trial court the defendant could have recovered approximately \$25,000 from plaintiff and still have one-half the plates. This, of course, cannot be.

The only evidence as to the value of the plates is the agreement of the parties upon the sale. The 32 plates were sold on a basis of \$42.72 a set. The two undelivered would be worth \$85.44, and under the circumstances this must be held to be the amount of damages suffered by defendant.

It is conceded that plaintiff was entitled to recover \$750 on the three notes. Deducting \$85.44, the amount due the defendant on its set-off, leaves a balance due plaintiff of \$664.56. The judgment of the Municipal court is reversed and judgment for plaintiff is entered in this court for this amount.

REVERSED, AND JUDGMENT FOR
PLAINTIFF FOR \$664.56.

Hatchett, F. J., and Johnston, J., concur.

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved. It is important to be clear and specific about the objectives.

THE INFORMATION OF THE BOARD OF DIRECTORS OF THE COMPANY IS REQUESTED THAT THE BOARD OF DIRECTORS OF THE COMPANY BE ADVISED OF THE RESULTS OF THE INVESTIGATION OF THE MATTER OF THE COMPANY'S FINANCIAL STATEMENTS FOR THE YEAR 1967.

Received 12 July 1998; accepted 12 October 1998

MAX KRUMHIN and BECKY KRUMHIN,
Appellants,

vs.

JOHN RICEK,
Appellee.

241 I.A. 622

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from an adverse judgment entered upon a directed verdict. The action was for damages alleged to have been sustained by plaintiffs through misrepresentations made by defendant inducing them to sign a contract for the sale by defendant to them of certain real estate in Chicago, which provided for payment by them of \$1,000 earnest money, which they paid.

The lot in question belonging to defendant fronted south. On the north end also running along its west side were alleys. Plaintiffs claim that they were induced to sign the contract and pay the earnest money by the representation that the alley on the west side of the lot was a public alley and that subsequently they discovered it was a private alley. At the conclusion of plaintiffs' evidence to support their claim, the court upon motion instructed the jury to find for the defendant and judgment was accordingly entered.

We can properly affirm this judgment for the reason that there is not even an attempt to abstract the written contract which is the basis of plaintiffs' suit. It was introduced in evidence and marked "Exhibit 1," but the only information we can gather as to its terms is from the desultory talk of the lawyers. So far as the abstract shows to the contrary, the contract contained all of the conditions and representations of the parties.

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It is the well established rule that under such circumstances the presumption will be indulged that if the evidence was completely abstracted it would sustain the judgment. Gloss v. Shedd, 218 Ill. 209. A reviewing court will not examine the record to find grounds for reversal. Detarding v. Central Illinois Public Service Co., 223 Ill. App. 374.

A further ground for affirmance is that, while there is evidence that certain real estate agents made statements to plaintiffs to the effect that the alley in question was a public alley, there is no evidence that these agents represented the defendant and none that they had any authority to make any such representations. The evidence tends rather to show that they were the agents of plaintiffs. There is an attempt to show that the defendant used the words "public alleys," but whether such an expression was made by him before or after the execution of the contract does not appear. He was not present when plaintiffs talked with the real estate agents and did not meet the plaintiffs until the execution of the contract, which had been drafted by the agents at the request of plaintiffs. Plaintiffs cannot maintain an action based upon a misrepresentation by the owner inducing them to sign a contract unless they prove that the alleged misrepresentation was made by him, or some one so authorized, prior to the execution of the contract.

The action was in trespass on the case on premises, and plaintiffs claimed damages to the extent of \$5,000 by reason of the alleged misrepresentation concerning the alley. The only way by which it appears that the alley was not a public alley is in the opening statement upon the trial by the attorney for the defendant. It is very doubtful if an attorney's statement under such circumstances can be considered as evidence of an essential

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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and, as a consequence, a more stable and efficient system.

Journal of Management Education 32(1) 10-21

fact. Pietach v. Pietach, 245 Ill., 454. However, the attorney went no further than to admit that this was not a public alley, but there was no attempt to prove who had title to or easement in the alley or under what conditions it could be used. So far as the record shows, the owner of the lot had an easement in and the right to use it. There was therefore no basis for testimony as to resulting damages because it was a private alley, and no testimony was offered to show any damages. There was nothing to submit to the jury upon this phase of the case.

Upon the trial plaintiffs seemed to abandon their claim for damages and to confine their claim to the recovery of the \$1,000 earnest money. The evidence tended to show that after plaintiffs' attorney had examined the abstract they called upon the defendant and offered to close the deal if the defendant would reduce the price \$250 on account of the alley, but defendant did not accept this offer. Subsequently, plaintiffs added to the contract the names of two other parties, who, plaintiffs say, were partners "in this property," and had contributed part of the earnest money, and recorded it. This was wholly inconsistent with the rescission of the contract. If a party desires to rescind a contract on the ground of fraud he must act at once upon discovering the fraud, and must announce his purpose to rescind the contract and adhere to this purpose. He is not permitted to play fast and loose. If he is entitled to a rescission, he must offer to put the parties in statu quo. Hansen v. Gavin, 260 Ill. 354. The conduct of the plaintiffs is inconsistent with a rescission of the contract.

A number of other points have been argued by respective counsel, especially relating to the reasons given by the trial court which prompted the peremptory instruction to the jury. Whether or not we agree fully with these reasons is not decisive of our con-

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clusion as to the judgment. Mulvihill v. Shaffer, 397 Ill. 549.
Upon the record as presented to us we hold, for the reasons above
indicated, that the judgment was proper and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

H. A. SOWLES,
Appellee,

vs.

THE SAYERS & SCOVILL COMPANY,
a Corporation,
Appellant.

241 I.A. 622

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for commissions on sales of funeral vehicles and supplies claimed under his contract with defendant, upon trial by the court had judgment for \$908.45. Defendant appeals.

The principal office of the defendant is in Cincinnati, Ohio, and H. V. Miller is its district manager for Lake County, Indiana, and Cook County, Illinois. Plaintiff had a written contract with defendant, giving him the privilege of selling funeral vehicles and ambulances in those counties with a five per cent commission on all sales in this territory during the life of the contract, which covered a period "commencing January 1, 1924, and ending December 31, 1924." This was extended by letter, dated December 30, 1924, from defendant saying, "We hereby extend this contract until January 31st, 1925, at which time it is to be terminated."

The judgment represents the commissions on two sales - one to a Mr. Wajtyla and the other to a Mr. Reilley. Two questions are presented: (1) Did this extension include any sales made on January 31, 1925? (2) Were the Wajtyla and Reilley sales made after that date?

Defendant contends that the word "until" in the

241 I.A. 622

ANNUAL UNION MEETING COURT

ON CHIEF

THE SAYSER & HOOVER COMPANY
a Corporation
of California

MR. JUSTICE MORGENTHAU DELIVERING THE OPINION OF THE COURT.

Plaintiff, bringing suit for commissions on sales of
certain vehicles and was also claimed under his contract with
defendant, when tried by the court and judgment for \$100.00.
Defendant answers.

The defendant offers in evidence the following in its defense:
That, this, and W. E. Miller is an attorney-at-law in the
County, Indiana, and Cook County, Illinois. That they are
attorneys-at-law with defendant, during the time covered by
the contract between them and defendant in their contract with a
firm and that defendant on all sales is sold through the firm
of the defendant, which covered a period of "commencing January
1, 1934, and ending December 31, 1934." This was extended by
order, dated December 30, 1934, from defendant saying, "the
party herein was contract with defendant and, that, it is
also is in the contract."

The judgment represents the commissions on the sales -
one to a Mr. Wojtyla and the other to a Mr. Reilly. Two questions
are presented: (1) Did the defendant have any sales with an
agency in 1934? (2) Were the Wojtyla and Reilly were sales
other than that?

Defendant answers that the same is true.

letter of extension signifies an intention to exclude the day to which it refers, and that the words "until January 31, 1925," make January 30 the last day of the contract. As a general rule the word "until" is a word of exclusion, but not always.

"The word 'until' may, either in a contract or a law, have an exclusive or an inclusive meaning according to the subject to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used." Webster v. French, 12 Ill. 301, 303.

One of the established rules of interpretation is that the construction given by both parties, as shown by their conduct with reference to the doubtful point, will control. January 31 fell on Saturday. Plaintiff worked for defendant on that day without objection from defendant. He personally took Wajtyla's order on January 31 and the same day delivered the signed contract and earnest money to Miller, defendant's district manager, who accepted the same. It was never claimed that this transaction was after the extended contract had expired, until this suit was commenced. Miller admitted upon the trial that plaintiff continued in defendant's employ "during January" under the extended contract.

The fact that defendant treated plaintiff as working for it during the entire day of January 31 and accepted the result of his services on that day, shows that it was the intention of both parties that the extended contract should include January 31, 1925.

Defendant argues that it was not permitted to introduce evidence showing that when the extension was made it was the intention of the parties to exclude January 31. The only question to any witness touching this was, "What was the understanding as to the extension?" Objection to this was properly sustained, as this was the ultimate fact for the court to determine. No offer was

latter of extension signifies an intention to exclude the day to which it refers, and that the words "until January 31, 1935," were January 30 the last day of the contract. As a general rule the word "until" is a word of exclusion, but not always.

"The word 'until' may, either in a contract or a law, have an exclusive or an inclusive meaning according to the subject to which it is applied, the nature of the transaction, which it specifies, and the connection in which it is used."

Webster v. French, 12 Ill. 201, 203.

One of the established rules of interpretation is

that the construction given to any contract, or other instrument,

conduct with reference to the contract made, will control.

January 31 fell on Saturday. Plaintiff worked for defendant on

that day without objection from defendant. He personally took

Plaintiff's order on January 31 and the next day indicated the

slight contract and contract made is Plaintiff's contract.

Plaintiff, who accepted the same. It was never claimed that this

transaction was after the contract contract had expired, until

this suit was commenced. Plaintiff worked for the defendant

plaintiff continued in defendant's employ "during January" under

the contract contract.

The fact that defendant treated plaintiff as working

for it during the entire day of January 31 was admitted by the

of his contract and that day, which fact is not in dispute.

Both parties had the contract contract under Plaintiff January

31, 1935.

Defendant argues that it was not permitted to intro-

duce evidence showing that when the extension was made it was the

intention of the parties to exclude January 31. The only question

to any witness regarding this was, "What was the understanding as to

the extension?" Objection to this was properly sustained, as this

was the ultimate fact for the court to determine. No other was

made to prove any circumstances or facts in connection with the making of the extension.

As we have seen, the Wajtyls contract was made on January 31 and the earnest money then paid. It is said that there was no sale until the home office had ratified it. This might be material in a dispute between the buyer and the seller. The record shows that it was the practice for plaintiff to receive his commission as soon as the contract of sale was made, Miller taking the responsibility without waiting to send the contract to the home office for acceptance.

On Thursday, January 29, Reilley examined a new funeral car then in the possession of the defendant ready to be delivered. An offer on his old car was made which he accepted, stating that he would be down on the following Monday to get the new car, and the new car was delivered to him on Monday. This must be considered as a sale made within the period of the contract so far as the rights of plaintiff to commissions are concerned.

Both parties acted upon the assumption that plaintiff's contract included January 31, and as the two sales in question were made within the contract term plaintiff was entitled to his commissions.

The judgment is affirmed.

AFFIRMED.

Matchett, F. J., and Johnston, J., concur.

was to prove any circumstances or facts in connection with the

making of the extension.

As we have seen, the Wajtyla contract was made on

January 21 and the earnest money then paid. It is said that there

was no sale until the home office had ratified it. This might

be material in a dispute between the buyer and the seller. The

record shows that it was the practice for plaintiff to receive his

commission as soon as the contract of sale was made, Miller taking

the responsibility without waiting to send the contract to the

home office for acceptance.

On Thursday, January 22, Reilly examined a new

transfer car then in the possession of the defendant ready to be

delivered. An offer on his old car was made which he accepted,

stating that he would be down on the following Monday to get the

new car, and the new car was delivered to him on Monday. This must

be considered as a sale made within the period of the contract so

that the rights of plaintiff to commissions are preserved.

Both parties acted upon the assumption that plaintiff

was entitled to commissions on the sale of the car.

It is said that the defendant was not notified of the sale until

after the sale had been made.

The defendant is entitled

to the commissions on the sale of the car.

Respectfully,
J. J. Miller

ISADORE FINKELSTEIN,
Appellee,
vs.
JERRY R. SELMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 622

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging by his statement of claim that he had performed work and labor in painting and decorating a number of apartments and rooms at the request of defendant; that the total charge for this work was \$1160, for which he had received \$700 on account. He brought suit for the balance of \$460. Upon trial by the court he was given judgment for \$295, from which defendant appeals.

The only questions presented are those of fact. That the work was performed does not seem to be controverted, but defendant questions the quality and character of the work and materials and the dimensions of the rooms, halls, doors, windows and floors decorated and the number of persons working on the job. We do not think these particulars are of paramount importance. Plaintiff testified in general terms as to what he did and gave his opinion as to the usual and customary charges for the same. In this he was supported by another witness who was an experienced painter and decorator. There was conflicting evidence as to the reasonable value of the work. From this conflict of evidence the court arrived at the conclusion that \$295 was what it was

reasonably worth, and we are unable to say that this is so manifestly improper as to require that the judgment be reversed.

Some of the objections now made by defendant were not made on the trial. No convincing reason is presented to justify any change in the judgment, and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

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ANNUAL REPORT MUNICIPAL COURT

AT CHICAGO.

241 I.A. 622

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CHICAGO MUNICIPAL COURT

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CHICAGO MUNICIPAL COURT

CHICAGO MUNICIPAL COURT

THE COURT HEREBY CERTIFIES THE OPINION OF THE COURT.

Plaintiff brought suit alleging by his statement of

that he had performed work and labor in painting and

decorating a number of apartments and rooms at the request of

defendant, that the total charge for his work was \$1100.00, for

which he had received \$700.00 on account. He brought suit for the

balance of \$400.00. Upon trial by the court he was given judgment

for \$400.00, from which defendant appeals.

The only questions presented are those of fact. That

the work was performed does not seem to be controverted, but de-

termining questions the quality and quantity of the work and the

materials and the dimensions of the rooms, halls, etc., which were

decorated and the number of rooms which were so

decorated. It is not denied that defendant did perform the work

alleged in his statement, but it is alleged that the work was

of such poor quality that it was not worth the price paid therefor.

There was conflicting evidence as to the

quality and value of the work. From this conflict of evidence

the court found in favor of defendant and it is so

advised. The court further found that the work was of such

poor quality that it was not worth the price paid therefor.

It is the opinion of the court that the work was of such

poor quality that it was not worth the price paid therefor.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. EDWARD J. HOWE,
Appellee,

vs.

NICHOLAS R. FINN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

241 I.A. 622

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in mandamus proceedings. Petition was met by a general demurrer, which was over-ruled and the defendants elected to stand by their demurrer. The writ was issued commanding the Fire Commissioner to notify the Civil Service Commissioners of the existence of vacancies in the position of assistant fire engineer and also in the position of fire engineer in the Fire Department of the City of Chicago, and to make requisition for persons on the reinstatement list of assistant fire engineer to fill said vacancies, and commanding the Civil Service Commissioners of the City of Chicago upon being so notified of the existence of such vacancies and upon requisition being made to certify to the said Fire Commissioner from said reinstatement list of assistant fire engineer to fill said vacancies and to include among them the name of Edward J. Howe, petitioner herein, and commanding the Fire Commissioner upon certification to him of names to fill said vacancies to appoint persons from those so certified to said vacancies, as prayed for in said petition.

Briefly stated, the petition alleges that petitioner is a citizen of the United States and a resident of the State of Illinois and City of Chicago; alleges the adoption of the Civil Service Act by the City, the appointment of Civil Service Commissioners; that on May 21, 1924, an ordinance was passed

known as the Fire Department Organization Ordinance, which created as members of the service of the Fire Department fire engineers and assistant fire engineers; that the Commission classified all the positions in the Fire Department, placing the position of fire engineer in Class 4 and the position of assistant fire engineer in the next lower class, Class 3; that thereafter the Commission held examinations for these positions and a large number of persons took the same, among them this petitioner; that his application was received, filed and accepted and the examination papers of applicants, including this petitioner's, were received, accepted and marked, and afterwards petitioner's name was placed upon the eligible list of assistant fire engineer, and subsequently the Fire Marshall notified the Commissioners of a vacancy in the position of assistant fire engineer; that on March 11, 1922, the Commission certified the name of petitioner, who then stood highest on the list of eligibles, and thereafter on March 16, 1922, the head of the fire department appointed petitioner to the position of assistant fire engineer, and thereupon petitioner entered upon and performed the duties of said position; that on June 1, 1920, the Commission adopted a rule which is still in effect relative to lay-offs and resignations. This rule IX is set forth in full in the petition. It provides that resignations might be withdrawn and cancelled at any time within thirty days of the filing of the same, and that when any employee returns from leave of absence and his position in the meantime has been filled, such employee shall have precedence to reinstatement in a position of the same class, grade and character of work according to his seniority of certification; that in cases where resignations are withdrawn or persons laid off, as provided for in said rule, such persons are placed upon a separate eligible list termed a reinstatement list; that

known as the Fire Department Organization Ordinance, which created
as members of the service of the Fire Department five engineers
and assistant fire engineers; that the Commission classified all
the positions in the Fire Department, placing the position of fire
engineer in Class 4 and the position of assistant fire engineer
in the next lower class, Class 3; that thereafter the Commission
held examinations for these positions and a large number of per-
sons took the same, among them this petitioner; that his application
was received, filed and accepted and the examination papers of ap-
plicants, including this petitioner's, were received, accepted and
marked, and afterwards petitioner's name was placed upon the
eligible list of assistant fire engineers, and subsequently the
Fire Marshal notified the Commissioners of a vacancy in the posi-
tion of assistant fire engineer; that on March 11, 1932, the Com-
mission notified the name of petitioner, who then stood highest
on the list of eligibles, and thereafter on March 12, 1932, the
head of the Fire Department accepted petitioner as the holder
of assistant fire engineer, and petitioner continued to hold
and perform the duties of said position until on June 1, 1935,
the Commission adopted a rule which is still in effect relative to
petitions and resignations. This rule is set forth in full in
the petition. It provides that resignations might be withdrawn
and cancelled at any time within thirty days of the filing of the
same, and that when any employee returns from leave of absence and
his position is the position he was filled, such employee shall
have precedence in reinstatement in a position of the same class,
grade and character of work according to his seniority of certifi-
cation; that in cases where resignations are withdrawn or persons
fall out, as provided for in said rule, such persons are placed
upon a separate eligible list termed a reinstatement list; that

on June 30, 1923, the petitioner filed his resignation with the head of the fire department and thereafter within thirty days made application for a withdrawal of the same, which was approved by the head of the department and the resignation was withdrawn and cancelled and petitioner placed on the reinstatement list, and is now third on such list; that on January 22, 1925, the City Council of Chicago passed an appropriation bill for the year commencing January 1, 1925, which included 101 fire engineers and 145 assistant fire engineers; that on that date there were five vacancies in the position of fire engineer and five in the position of assistant fire engineer; that it then became the duty of the Fire Commissioner to notify the Civil Service Commission of the vacancies and it became the duty of the Commission to certify the names of a sufficient number of persons on the reinstatement list to fill the vacancies, among them the name of petitioner, and it was the duty of the Fire Commissioner to appoint the persons so certified to the vacancies; that on April 3, 1925, petitioner made a demand for reinstatement but the defendant Fire Commissioner failed to requisition for the names of persons to fill the vacancies and the Civil Service Commission failed to certify names. Petitioner prayed that the writ of mandamus be directed to said defendants ordering them to perform their duties as set forth, all as provided by law.

Many of the points made by defendants have been considered by us in the recent case of People ex rel. Watters v. Finn et al., No. 30621, in which an opinion was filed by this court on March 2, 1926. What we have said in that opinion is applicable to the facts now before us, except in one particular: In this case petitioner alleges that he was duly appointed assistant fire engineer and entered upon and performed the duties of this position, but that subsequently he filed his resignation and thereafter,

within thirty days, withdrew the same, which was accepted by the head of the department, and that pursuant to Rule IX he was placed on the reinstatement list.

It is earnestly argued by defendants that the withdrawal and cancellation of petitioner's resignation restored him to his office automatically and his neglect and refusal to perform the duties of such office constituted an abandonment of same and a second resignation; that he could not legally be placed upon the reinstatement list under the terms of Rule IX and that there is no such reinstatement list provided by law or the rules for the reinstatement of officers who resign under this rule. This rule as it appears in the petition is as follows:

"RULE IX.

LAY-OFFS, RESIGNATIONS AND REINSTATEMENTS.

"Section 1. Lay-Offs. Whenever it becomes necessary, through lack of work or funds, or for other cause, to reduce the force in any employment, the person who was last certified to such employment shall be the first laid off. Employment in such cases of lay-off shall mean a force under one general head and the Commission shall determine the facts relating thereto. Persons laid off in accordance with the foregoing procedure shall be entitled to have their names placed at the head of a reinstatement list, according to the seniority of their certifications.

"Section 2. Resignation. A copy of the resignation of an officer or employe from the classified service shall be filed with the Commission by the head of the department receiving and accepting the same. The Commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing of the same, provided the head of the department concerned approved of such withdrawal and cancellation.

"Section 3. Reinstatement. When any officer or employe has returned from a leave of absence and his position in the meantime has been filled by certification, or when any officer or employe has been laid off in accordance with the preceding section, or when the position of any officer or employe has been abolished, such officer or employe shall have precedence to reinstatement in a position of the same branch, class, grade or rank and character or work and approximate pay, according to his seniority of certification."

Giving this rule a reasonable construction and one consistent with its evident purposes, which we are bound to do (Kickapoo District v. Mattoon, 284 Ill. 396), it was obviously

in the reinstatement list.

no other one than ourselves we cannot witness it

to his office automatically and his neglect and refusal to perform the duties of such office constituted an abandonment of same and a second resignation; that he could not legally be placed upon the

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... lack of work or funds, or for other causes, to be

There is no force in any employment, the person who was last

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Employment in each case of lay-off shall mean a loss

THE UNIVERSITY OF CHICAGO PRESS

the facts relating thereto. Persons listed in accordance

THE UNIVERSITY OF CHICAGO

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the withdrawal of a resignation and its cancellation upon

Application of any kind within thirty days after the filing

At the same time, the Department of the Interior, Bureau of Land Management, is also conducting a study of the same area.

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Section 1. The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the term of one year, beginning on the 1st day of January, 1901, and ending on the 31st day of December, 1901:

THE UNIVERSITY OF CHICAGO PRESS

1. 1990年1月1日起，凡在境内从事生产经营活动的纳税人，其应纳税额在1000元以下者，暂免征收滞纳金。

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"...noting his conviction."

Giving this rule a reasonable construction and we

to be a part of the same.

VIENNA, AUSTRIA, 1911. III 1882, 1901, 1911. V 1911, 1911, 1911.

intended to provide for a situation where a position from which a person had a leave of absence or from which he had resigned became filled in the interim between his resignation and the withdrawal of his resignation; upon such withdrawal his name should be placed on the reinstatement list to await the next vacancy.

We do not agree with the construction of the rule contended for by defendants' counsel. The construction we have given is sensible and workable and any other would result in confusion. There is no warrant in law which would compel a person appointed to a vacancy created by a resignation to yield his position to a former incumbent who had resigned but within thirty days had withdrawn his resignation. It is clearly more just that the party appointed to fill such vacancy should continue in such position and the former incumbent, who voluntarily resigned but within thirty days withdrew his resignation, should step back and take his place in the line of eligibles.

Arguments based upon the rule applicable to officers are not relevant, as petitioner is seeking a position, not an office.

The other points raised are sufficiently met by what we have said in People ex rel. Watters v. Finn et al., supra.

The order of the court over-ruling the general demurrer was right and the order awarding the writ properly followed. The judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

intended to provide for a situation where a position from which a person had a leave of absence or from which he had resigned became filled in the interim between his resignation and the withdrawal of his resignation; upon such withdrawal his name should be placed on the reinstatement list to await the next vacancy.

We do not agree with the construction of the rule contained for by deliberate counsel. The construction we have given is sensible and workable and any other would result in confusion. There is no warrant in law which would compel a person appointed to a vacancy created by a resignation to yield his position to a former incumbent who had resigned but within thirty days had withdrawn his resignation. It is clearly more just that the party appointed to fill such vacancy should continue in such position and the former incumbent, who voluntarily resigned but within thirty days withdrew his resignation, should step back and take his place in the line of eligibles.

The arguments based upon the rule applicable to officers and enlisted men are entirely unavailing, as stated previously, and are

refuted.

The same points which are refuted here are also refuted by the

same rule in the case of officers and enlisted men.

The intent of the rule covering the general case

covers the case of the soldier retaining his right to re-enlist.

The argument is refuted.

Very truly,
Yours,

W. L. and J. L. and J. L.

CHARLES O. KORTEN,
Appellee,

VS.

NELS J. HOLTER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 T.A. 623

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff's claim is based on a promissory note dated October 20, 1914, signed by the defendant, thereby promising to pay on or before November 25th, to the order of the plaintiff, \$160 with interest. Defendant filed a claim of set-off for the value of legal services furnished by him to plaintiff. Upon trial by the court the finding was for the plaintiff on his claim and against the defendant on the claim of set-off. Judgment was entered for \$175, from which defendant appeals.

The amount due on the note is not in controversy, but defendant asserts that the court improperly found against his claim of set-off. The court could rightly conclude that in April, 1916, nearly two years after defendant gave his note to plaintiff, defendant rendered certain legal services for plaintiff with reference to executing a number of deeds. Plaintiff says he paid defendant \$25 in full for these services and defendant denies this. It was for the court to determine which of the parties was stating the fact in this respect.

Plaintiff's version was supported by two letters, written by defendant to the plaintiff. The first one, dated November 6, 1918, acknowledged plaintiff's request that the note be paid and promised to pay the interest and principal "in full soon." In the second letter, dated September 8, 1920, defendant again promised to pay his note and made other references to the transaction between the parties. In neither of these letters is

829 A.T. 142

transmission between the parties. In neither of these letters is
said promised to pay his note and made other references to the
same. In the second letter, dated September 8, 1930, defendant
said and promised to pay the interest and principal "in full"
on September 8, 1931, acknowledged plaintiff's request that the note
be taken by defendant to the plaintiff. The first one, dated Nov-
ember 8, 1930, was stating the fact in this respect.

Defendant denies this. It was for the court to determine which
of the two letters was genuine. Plaintiff's version was supported by two letters,
one dated September 8, 1930, and another dated September 8, 1931, both of which
were taken by defendant to the plaintiff. The first one, dated Nov-
ember 8, 1930, was stating the fact in this respect.

Defendant denies this. It was for the court to determine which
of the two letters was genuine. Plaintiff's version was supported by two letters,
one dated September 8, 1930, and another dated September 8, 1931, both of which
were taken by defendant to the plaintiff. The first one, dated Nov-
ember 8, 1930, was stating the fact in this respect.

there any claim or suggestion that plaintiff was indebted to the defendant for any legal services.

The court was fully justified in finding that the legal services had been paid for in full, and, as there was no controversy as to the amount due on the note, the judgment for plaintiff properly followed and it is affirmed.

AFFIRMED.

Witchett, F. E., and Johnston, J., concur.

There was also a statement that the amount of the note was \$100.00 and that the note was dated July 1, 1934.

The next day this fact was reported to the bank and the bank advised that the note had been paid for in full and that there was no outstanding amount on the note. The fact that the note was paid for was also reported to the bank and it is believed that the bank is now satisfied with the matter.

APPENDIX.

Statement of the bank dated July 1, 1934.

Statement of the bank dated July 1, 1934.

Statement of the bank dated July 1, 1934.

Statement of the bank dated July 1, 1934.

449 - 30713

GEORGE F. SLATER,
Appellee,

vs.

ALVIN OPPENHEIMER, CONSTANTINE
GIOVAN and PETER GIOVAN,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

241 I.A. 623

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

On the evening of December 31, 1926, plaintiff, while walking on the sidewalk of 63rd street in Chicago, fell into an open doorway in the sidewalk leading to the basement of the adjoining building and received severe injuries. He brought suit for damages and upon trial had a verdict for \$15,000. From the judgment thereon defendants appeal.

By his declaration plaintiff charged (1) that defendants negligently left open the door to the basement at night; (2) that defendants violated city ordinance No. 2313, which prohibits any person from removing any covering of any coal hole, vault or chute under any street or sidewalk unless it is protected with a box or curb, and provides further that such covering must not be removed until ^{after} sunrise of any day and must be replaced before one-half hour after sunset; (3) that defendants violated city ordinance No. 2331, making it unlawful for any person owning or using any outside stairway or other opening in any public sidewalk to allow the same to remain uncovered or open except while it is actually being used for the purpose of entrance or exit or for the purpose of introducing or removing any article through such opening; (4) that defendants permitted the doors of the sidewalk stairway to be and remain open and insufficiently protected. The fifth count was in substance the same as the second count. Defendants filed a plea of general issue and pleas of non-ownership, non-control, non-operation of

the doors or arway and non-removal of the covering thereon, to which plaintiff filed replications.

There is not much variance in the testimony. The jury could properly believe that at the time in question the defendants, Peter and Constantine Giovan, brothers and partners, were the owners of the building located at the southeast corner of South Park avenue and 63rd street in Chicago. They leased the first floor to the Walgreen's Drug Store, and subsequently in March, 1920, leased to the Walgreen Company sufficient floor space in the basement for a refrigerating plant and cabinet, retaining the balance of the basement space for coal, the heating plant of the building, and an electrical pump used by the owners of the building to pump out any accumulated water. The entrance to the basement on 63rd street was by two trap doors, opening at right angles to the building, which when opened stood up about two feet on either side of the entrance. This door had a lock bought by the Walgreen Company, which had the key.

Sometime before the accident the basement became flooded with water, as the pump was out of order. Peter Giovan telephoned to Alvin Oppenheimer, a plumbing contractor, one of the defendants, to put the pump in order. Oppenheimer went to the drug store, got the key from one of Walgreen Company's clerks and opened the basement entrance and inspected the pump, which he found burned out. He reported this to Peter Giovan, telling him it would be necessary to buy a new pump. Oppenheimer received a figure from the Chicago Pump Company, which he reported to Giovan, who was unwilling to pay so much for the pump and expressed a desire to buy it somewhere else. Subsequently Peter Giovan ordered the pump direct from the Chicago Pump Company, and on December 31, 1920, sent his men for it, who brought it to the building by truck. Oppenheimer's two assistants arrived at the premises about

five o'clock p. m., and they and Giovan's two men carried the pump through the doorway in the sidewalk down into the basement.

Oppenheimer's men say these doors were open when they got there; that there was a board which fitted over the door to prevent anyone from falling down over the side, but that this protecting board or frame was standing to one side against the wall. After helping to carry the pump down into the basement, Giovan's men left and Oppenheimer's employees remained to put the pump in place. It was a dark and stormy evening, and about thirty or forty-five minutes thereafter plaintiff, while walking easterly on 63rd street on the sidewalk, fell through this open and unguarded doorway, receiving serious and permanent injuries.

Neither the extent of plaintiff's injuries nor the amount of the verdict is questioned. No question of contributory negligence of plaintiff is raised, and it is conceded that the accident was caused by some person or persons negligently leaving the doors open and unguarded. Each defendant argues to exonerate himself and inferentially or directly accuses some one else.

It is contended on behalf of Peter and Constantine Giovan that, as the property was leased to the Walgreen Company, the owner is not liable, on the theory that where a lesser has given up full control and possession of the demised premises and appurtenances to a tenant and the premises were not in a dangerous condition due to defects in construction or a continuing nuisance thereon, the lessor is not liable for damages to a stranger due to the negligence of the lessee. Doubtless this is the law, but not applicable to the present facts.

The Walgreen Company leased the first floor and also a comparatively small space in the basement for its refrigerator and cabinet. The balance of the basement and the part of the basement

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... and there was a board which tilted over the door in

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After a brief stay in the city, the party moved to the country, where they remained for some time. The party then returned to the city, where they remained for some time. The party then returned to the city, where they remained for some time.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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himself and informally by orally stating how we plan.

It is noted that the property was damaged by the fire and the property was damaged by the fire.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a significant impact on the economy and society. The majority of the population now lives in urban areas, which are characterized by high population density, a high level of economic activity, and a high level of social organization. This has led to the development of a new type of society, which is based on the city. The city is now the center of economic and social life. The majority of the population now lives in urban areas, which are characterized by high population density, a high level of economic activity, and a high level of social organization. This has led to the development of a new type of society, which is based on the city. The city is now the center of economic and social life.

that the \mathcal{H}^1 -convergence of \mathcal{H}^1 -functions is not a sufficient condition for the convergence of the corresponding measures. In fact, the convergence of the measures is not even a necessary condition for the \mathcal{H}^1 -convergence of functions.

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THE UNIVERSITY OF CHICAGO

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where the pump was located was in the possession of the owners, the defendants. It is of no importance that the key to the lock was kept in the drug store. This would be the natural and convenient place for it so that the employees of the drug store could have access to the part of the basement leased to it and also that the owners of the building could have access to the coal, heating plant and pump in the part of the basement retained by them. The doors and stairway leading to the basement were not leased to the drug company, neither did it have exclusive possession of the same. It had only the right to use this means of admission to its refrigerator and cabinet.

While it is true that, if the owners of the building had contracted with Oppenheimer to install the electrical pump, turning over the entire work to him and had not, either by themselves or their employees, joined in any part of the transaction which was the cause of plaintiff's injury, the owners would not be liable, yet the evidence shows that the two employees of the owners joined with the two employees of Oppenheimer in carrying the pump down through the doorway into the basement; that at this time the doorway was open and the frame or protecting board was not in place but leaning against the wall; that the owners' agents departed from the premises, leaving the doorway open and unguarded, and Oppenheimer's men proceeded with their work in the basement without taking any steps towards closing the doorway or guarding it from pedestrians on the sidewalk.

We do not deem it important as to who, in the first instance, opened the doors. This, of course, was necessary to allow the four men to carry the pump down into the basement. The negligence lay in all four of the men leaving the doorway thus open and unguarded to the danger of persons using the sidewalk. This act was joint, participated in both by the representatives

[illegible]

of the owners and of the contractor. Under such circumstances the defendants are jointly liable.

It does not avail the defendant, Oppenheimer, to argue that his contract called only for the installation of the new pump and that it was no part of his contract to carry it into the basement. The pump was brought to the premises by the owners, and the act of carrying it from the sidewalk into the basement was properly part of the act of installation. We cannot draw a fine line of distinction as to just the moment when installation of the pump began. All the parties evidently acted on the assumption that both the delivery and installation involved placing it in the basement.

There is no basis in the record to support the argument of the defendant, Constantine Giovan, based upon the rule that the contract of one joint tenant respecting joint property without the authority or consent of his co-tenant cannot bind or prejudicially affect the other co-tenant. There is no evidence of any joint tenancy. Peter and Constantine Giovan were partners in business and owned the property, the title being in both names and the rents and losses being shared equally. Furthermore, the contract for the new pump was ^{for} the benefit of both owners.

The many cases cited by the defendants are, for the most part, not in point. The jury was justified in finding that the negligent act of leaving the doors open and unguarded was the joint act of all the defendants. It has been held in innumerable cases, where the negligent act causing the injury is joint, liability is imposed upon all the parties joining in the negligent act.

Upon the facts we see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

475 - 30739

SAMUEL R. RAPPOLO,
Appellant.

vs.

MARTHA P. ANDERSON,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

241 I.A. 323

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover a real estate broker's commission and upon trial by the court it was adjudged that he take nothing, from which he appeals. Defendant does not appear in this court.

According to plaintiff's statement of the case he is a real estate broker and defendant an owner of real estate in Chicago. On September 10, 1924, defendant listed her property with plaintiff for sale, price \$7500, cash payment \$500, balance in \$50 instalments drawing 6 per cent. September 27 defendant appeared at plaintiff's office saying that she was leaving town but would be back the following Saturday. The latter part of September Mr. Jacob J. Liewergen saw plaintiff's sign on the premises, went to his office on Sunday, September 28, and there talked with one of plaintiff's salesmen, a Mr. Kropke, who took the prospect to the premises, but as they were closed made an arrangement to go with him the following morning, Monday, September 29, at which time admission was gained and the premises examined. Liewergen agreed to buy the premises for \$7500, the price at which it was listed by defendant, and pay \$750 in cash. He made a deposit and thereafter called at the office of plaintiff several times during that week to make definite arrangements to close the deal.

On September 30 plaintiff notified Mrs. Anderson, who was then in St. Paul, Minnesota, that the property had been sold, giving her the terms, and as the parties were anxious to move in, asking her to advise by wire whether he should go ahead and make a contract or await defendant's arrival. Defendant replied that she would arrive on Saturday. She arrived in Chicago Friday, and Mr. Kropke spoke to her about four o'clock in the afternoon and asked her to come to plaintiff's office that evening to close the deal, as Mr. Liewergen was very anxious to get possession of the property. Defendant pleaded that she was tired and preferred to close the deal the next morning. This was communicated to Mr. Liewergen, who asked that it be closed in the evening about seven o'clock. Defendant agreed to this, saying that it would be all right and she would be at plaintiff's office at seven o'clock Saturday evening to sign the contract. On Saturday afternoon Mr. Kropke met the defendant on the premises and she told him that it was doubtful if she would go through with the deal because she had some one else who was interested, but that she had no assurance that these other people were going to buy and that she had received no deposit from them. It is in evidence that no other purchaser made a deposit until that Saturday evening. On this evening Mr. Liewergen appeared at plaintiff's office, ready to close the deal, bringing with him sufficient cash for that purpose. He remained there until about ten o'clock but defendant did not appear, sending word by her daughter that she would not keep the appointment with plaintiff and his prospect. It is also in evidence that shortly after this time defendant told plaintiff that the reason she did not appear on Saturday evening or call him earlier was because she was working with another prospect, whom defendant told that if a deposit was not made she was going to plaintiff's office to close the deal.

On September 30 Plaintiff notified Mrs. Anderson, who was then in St. Paul, Minnesota, that the property had been sold, giving her the terms, and as the parties were anxious to have it, asking her to advise by wire whether he should go ahead and make a contract or wait defendant's arrival. Defendant replied that she would arrive on Saturday. She arrived in Chicago Friday, and Mr. Kropp spoke to her about four o'clock in the afternoon and asked her to come to Plaintiff's office that evening to close the deal, as Mr. Anderson was very anxious to get possession of the property. Defendant pleaded that she was tired and preferred to close the deal the next morning. This was insisted to Mr. Anderson, who asked that it be closed in the evening about seven o'clock. Defendant agreed to this, saying that it would be all right and she would be at Plaintiff's office at seven o'clock Saturday evening to sign the contract. On Saturday afternoon Mr. Anderson and the defendant on the phone set out the terms of the deal, and it was agreed that the deal would be closed at seven o'clock and that the deal was not to be closed until that time. Defendant had no assurance that these other people were going to buy and that she had received no deposit from them. It is in evidence that no other purchaser made a deposit until that Saturday evening. On this evening Mr. Anderson announced to Plaintiff that he called, ready to close the deal, but that he was not alone with him until about ten o'clock. He remained there until about ten o'clock and the deal was not closed. Plaintiff was not present. It is also in evidence that shortly after this time defendant told Plaintiff that the reason she did not appear on Saturday evening or with the other party was because she was waiting for a better price, and that she was going to Plaintiff's office to close the deal.

It is well settled that where an agent is employed to sell real estate and produces a buyer ready, able and willing to purchase the same upon the owner's terms and the owner refuses to complete the sale, the agent is entitled to his commissions. Hunt v. Judd, 225 Ill. App. 395, and many other cases. It is also well established that while a principal may employ several brokers to sell the same property and may sell to the buyer first produced, he must remain neutral and fair as between the brokers. Day v. Porter, 161 Ill. 235; Fox v. Ryan, 240 Ill. 391.

Applying these rules to the facts as stated, it is difficult to determine upon what theory the court found against the plaintiff. That he procured a purchaser able, willing and ready to buy the property upon the defendant's terms does not seem to be controverted. Her failure to keep her promise to meet with these parties to close the deal seems to have been inspired by a desire to favor another broker. It does not appear that the prospect of this other broker offered any better terms than those offered by plaintiff's prospect. Upon the record before us, the defendant did not act fairly between the brokers.

Upon the facts and the law this judgment cannot stand and it is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, F. J., and Johnston, J., concur.

It is well settled that where an agent is employed

to sell real estate and procures a buyer ready, able and willing

to purchase the same upon the owner's terms and the owner re-

fuses to complete the sale, the agent is entitled to his commis-

sion. Went v. Tiedt, 222 Ill. App. 398, and many other cases.

It is also well established that while a principal may employ

several brokers to sell the same property and may sell to the

broker first produced, he must remain neutral and fair as between

the brokers. Day v. Porter, 161 Ill. 328; Box v. Ryan, 240 Ill. 391.

Applying these rules to the facts as stated, it is

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the plaintiff. That he procured a purchaser able, willing and

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that the prospect of this other broker offered any better terms

than those offered by plaintiff's prospect. Upon the record be-

fore us, the defendant did not act fairly between the brokers.

Upon the facts and the law this judgment cannot

stand and it is reversed and the cause remanded.

REVEREND AND HONORABLE

JUDGES, J. J. and Johnston, J., con cur.

111 - 30369

J. W. BLAIR,

Appellee,

v.

FRANK E. SHAW,

Appellant.)

241 I.A. 623

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Shaw seeks to reverse a judgment for ^{\$7,000} \$6,957.44, recovered against him by the plaintiff Blair in the Circuit Court of Cook County, the issues having been submitted to the trial court without a jury.

The record discloses that the defendant Shaw was one of the directors of a corporation known as the Self-Seating Valve Company. This company was apparently trying to do business on too small a capital and was in frequent need of funds. Shaw was a creditor of the company to the extent of \$80,000, by reason of advances he had made to it from time to time. He held the company's notes for this indebtedness. The Valve Company did its banking business with the Logan Square Trust & Savings Bank, of which one David Fiedemann, Jr. was vice-president. Fiedemann was also apparently a Valve Company director. The company was a frequent borrower at this bank. On July 1, 1921, the Valve Company owed the

bank a balance of \$16,274.48, for borrowed money. The records of the bank show that on July 29, 1921, the Valve Company borrowed an additional \$12,000 from the bank, and on the same day paid off \$6,000 of its bank indebtedness, which left the Valve Company owing the bank \$21,974.48 at the close of business on that day. When the Valve Company borrowed this \$12,000 from the bank on July 29, 1921, it gave the bank a 90 day note for that amount, which would make the note fall due on October 27, 1921.

It further appears from the record that the Valve Company needed further cash to run its business and that Wiedemann was willing to advance \$6,000 in cash to the Company, taking its note therefor, but only on condition that Shaw agree to subordinate all claims he might have against the Company, to its note which was to be given by the Company to Wiedemann for the \$6,000 to be advanced by him. That being the situation, the Valve Company executed its note for \$6,000 drawn to Wiedemann's order, and delivered that note to Wiedemann on August 1, 1921, and at the same time Shaw executed a written contract which was also delivered to Wiedemann. This recited that whereas the Valve Company was largely indebted to Shaw, and whereas it was "necessary for the said Self-Seating Valve Company to raise Six Thousand Dollars (\$6,000) cash to meet its current obligations and carry on its business," and whereas Wiedemann was willing to loan said sum to the Valve Company and take its 90 day note, dated August 1, 1921, "upon condition that the indebtedness due from the Self-

Seating Valve Company to the said Frank S. Shaw is subordinated to the indebtedness of Six Thousand Dollars (\$6,000) to the said David Wiedemann, Jr., to be evidenced by said promissory note," and whereas Shaw was desirous that said loan be made by Wiedemann to the Valve Company, "in order that it may have funds to carry on its business and meet its current obligations;" therefore, in consideration of these premises and the actual benefits to be derived, Shaw "has, and by these presents does covenant, promise, and agree to and with the said David Wiedemann, Jr., his heirs and assigns, and to and with anyone" who might thereafter become the owner of the note for \$6,000, to be executed by the Valve Company, in consideration of the advancement of that amount to it, "that all claims and demands of every kind and nature whatsoever which he, the said Frank S. Shaw, can or may have against the Self-Seating Valve Company, prior to the date hereof, shall be subject to and subordinate to the said promissory note, and that said promissory note shall and will be paid in full by the said Self-Seating Valve Company before he shall be entitled to have, receive or demand from the said Self-Seating Valve Company any payment whatsoever to him the said Frank S. Shaw," on account of any claim he had against the Valve Company. When Wiedemann received this \$6,000 note from the Valve Company and this contract to which we shall refer as the Shaw contract, on August 1, 1921, he went to the First National Bank of Harvey, Illinois, of which his father David Wiedemann, Jr., was an officer, and discounted the Valve Company note, and on August 2, 1921 he deposited the proceeds of that discount in his personal

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account at the Logan Square Trust & Savings Bank, and then he presumably issued his own check for that amount, for on the same day the same amount was credited to the Valve Company in its loan account with the bank, the credit being given on the \$12,000 note of the Valve Company dated July 22, 1931, which was a 90 day note due on October 27, 1931.

Four months after the Valve Company procured this \$6,000^{credit} from Wiedemann, Jr., in connection with which the Shaw contract was executed, namely, in December 1931, the Valve Company filed a voluntary petition in bankruptcy. A few months later Wiedemann, Sr., desiring to get the Valve Company's paper out of his bank, sent for his son and asked him to arrange to have that done. Wiedemann, Jr. then turned to the plaintiff and one Trott, who he testified were both good personal friends of his and "gentlemen who were associated with me in the Valve company as directors," and requested them to join in the signing of a \$6,000 note to be given to the First National Bank of Harvey, in lieu of the Valve Company's note then being held by that bank, and this was done, the plaintiff and Trott executing such a note in April 1932.

The theory upon which the plaintiff bases his action in the case at bar is that when he and Trott signed the \$6,000 note which they gave to the First National Bank of Harvey, at the request of Wiedemann, Jr., and his father, for the purpose of eliminating the Valve Company's paper from that bank, he, the plaintiff, came to be the owner of the Valve Company note and the Shaw contract, Trott having subsequently turned over any interest he

[illegible]

Your attention is directed to the fact that the above information is being furnished to you for your information only and is not to be used for any other purpose. The information is being furnished to you in confidence and is not to be disclosed to any other person without the express written consent of the Bureau.

The Deputy Agent in Charge of the Bureau of Investigation, Department of Justice, is hereby notified that the following information has been received from the Bureau of Investigation, Department of Justice, on the subject of the above-captioned case:

had in these documents to the plaintiff. It appears that the Valve Company note and the Shaw contract were not turned over to the plaintiff Blair in April 1932, when he gave his \$6,000 note to the Harvey Bank, but he explains this by testifying that Wiedemann, Sr. told him that the Valve Company note and the Shaw contract were in the hands of counsel for his son, Wiedemann, Jr., and that they would be glad to handle the collection of what they claimed to be due on that note and contract for the plaintiff, Blair, and when the balance due was collected it would be paid to the Harvey Bank and this would take up the note which was then being executed by Blair and Trott and thus the latter would never be called upon to pay their note.

The record further shows that in connection with the bankruptcy proceedings of the Valve Company, Wiedemann, Jr. filed a claim for the \$6,000 due on the Valve Company's note dated August 1, 1931, Wiedemann filing the claim as the owner of the note in December, 1932, eight months after the note had been eliminated from the Harvey Bank, by the plaintiff and Trott giving their note to the bank in place of it, and a dividend amounting to \$522.00 was paid to Wiedemann, Jr. on this claim.

It further appears from the record that in April 1932, a few days after the plaintiff Blair had joined with Trott in executing their \$6,000 note to the Harvey Bank, for the purpose of eliminating the Valve Company note from that bank, the plaintiff Blair also filed a claim in the bankruptcy proceedings of the Valve Company, this claim being for \$526.04, based on a loan made by the plaintiff to the

Valve Company, and in January 1933, Blair received a dividend on that claim.

The record further shows that the defendant Shaw filed two claims against the Valve Company in the bankruptcy proceedings, one for \$81,493.26, being the indebtedness from the Valve Company to Shaw to which reference has previously been made, and the other being a claim for further cash advanced to the Valve Company by Shaw in June, July, August and September, 1931, totalling \$30,934.49. Both of these claims were allowed, Shaw receiving a dividend of \$7,989.91 on the first claim, and \$2,691.20, on the second claim.

Blair, now claiming to be the owner of the Valve Company's note for \$6,000, drawn to the order of Wiedemann, Jr., and delivered to him on August 1, 1931, and also claiming to be the owner of the Shaw contract, brought this action against Shaw, the action being based on the latter document, namely, the Shaw contract. The plaintiff's declaration consisted of the consolidated common counts and also two special counts. Each of the latter recited that on August 1, 1931, the Valve Company requested Wiedemann, Jr. to loan it \$6,000 and that Shaw "in order to procure the making of the said loan from the said David Wiedemann, Jr. to the said Self-Sealing Valve Company, executed and delivered to the said David Wiedemann, Jr., his certain contract in writing," which contract was then set out in these two counts in full. The plaintiff then proceeded to allege that in consideration of the undertaking of Shaw, as set forth in the Shaw contract, Wiedemann Jr. loaned the Valve Company the sum of \$6,000, and the Company

Waco Company, and in January 1935, it received a dividend of \$100,000.

The record books show that the company was organized for the purpose of operating the Waco Company in the petroleum business, and for the purpose of operating the Waco Company in the petroleum business. The first meeting to which records have been made, and the other being a date for further action, was held on the 15th day of January, 1935, at which time the company was organized. The first meeting was held on the 15th day of January, 1935, at which time the company was organized. The first meeting was held on the 15th day of January, 1935, at which time the company was organized.

It is stated that the company was organized for the purpose of operating the Waco Company in the petroleum business, and for the purpose of operating the Waco Company in the petroleum business. The first meeting to which records have been made, and the other being a date for further action, was held on the 15th day of January, 1935, at which time the company was organized. The first meeting was held on the 15th day of January, 1935, at which time the company was organized. The first meeting was held on the 15th day of January, 1935, at which time the company was organized.

executed and delivered to Wiedemann, Jr., its promissory note for that amount, dated August 1, 1921, due October 30, 1921, which note was set out in full. The plaintiff then alleged further that although demand had duly been made, the company failed to pay the note at its maturity or at any other time. Further, the plaintiff alleged that in December, 1921, in the bankruptcy proceedings of the Valve Company, Wiedemann, Jr., filed this note and his claim for the amount due from the Valve Company upon it, which claim was allowed; and that in April 1923, there was paid to Wiedemann, Jr., by the trustee in bankruptcy, as a dividend on that claim, the sum of \$522, which was the only dividend ever paid upon it; and that subsequently the bankrupt was duly discharged. The plaintiff then alleged that although demand had often been made, the Valve Company had neglected and refused to pay any other sums upon that note; and that the balance of the principal and interest remained due and unpaid; and further, that Shaw, in spite of his undertaking, as set forth in the Shaw contract, nevertheless, in connection with the bankruptcy proceedings of the Valve Company, filed his claim for the amount of the indebtedness of the Valve Company to him, amounting to \$61,493.26, and received thereon a dividend of \$7089.91. The plaintiff then alleged that he had since become the legal holder and owner of the Valve Company note for \$6,000 and the Shaw contract, and that "because of the premises" the defendant was liable to the plaintiff "in the amount of the balance, principal and interest" due upon the promissory note, but that although demand had often been made, the defendant had neglected and

presented and delivered to the company, Inc., for payment
made for that amount, dated August 1, 1931, and October
20, 1931, which were not paid in full. The plaintiff
then alleged further that although demand had been made
made, the company failed to pay the note at the maturity
on or after that date. Further, the plaintiff alleged that
in December, 1931, in the handwriting proceedings of the
Valve Company, Wisconsin, Inc., filed this case and the
claim for the amount due from the Valve Company upon its
note which was allowed and paid in April 1932, whereupon
said to Wisconsin, Inc., by the trustee in bankruptcy, was
a dividend on that claim. The sum of \$2000.00 was the
only dividend ever paid upon it and that subsequently
the plaintiff was duly discharged. The plaintiff then
alleged that although demand had been made, the
Valve Company had neglected and refused to pay any other
sums upon that note and that the failure of the plaintiff
and interest remained due and unpaid; and further, that
now, in light of the understanding, as set forth in the
first contract, notwithstanding its connection with the
trust proceedings of the Valve Company, filed in this
for the amount of the indebtedness of the Valve Company
to him, amounting to \$2,100.00, the plaintiff desires a writ
and of \$2000.00. The plaintiff then alleged that he had
since become the legal holder and owner of the Valve Com-
pany note for \$2,100 and the first contract, and that the
sums of the plaintiff's claimant was liable to the
plaintiff in the amount of the interest, principal and
interest due upon the promissory note, but that although
demand had been made, the interest was neglected and

refused and still did neglect and refuse to pay this amount to the plaintiff.

The first question to be determined is: What was the undertaking of Shaw, as set forth by him in the so-called Shaw contract? In our opinion, Shaw's undertaking is entirely clear as it is set forth in that contract. Shaw clearly did not guarantee the payment of the \$6,000 note of the Valve Company, nor did he enter into a contract of suretyship with regard to the note, as the plaintiff contends. He merely agreed that, if Wiedemann, Jr. would loan the Valve Company \$6,000 "cash, to meet its current obligations and carry on its business" or, as expressed in another part of the contract, "in order that it might have funds to carry on its business and meet its current obligations," then all claims which he, Shaw, had against the Valve Company should be considered "subject to and subordinate to the said promissory note," and that the note "shall and will be paid in full," not by him but "by the said Self-Seating Valve Company," and not even then at all events but that it should be so paid by the company "before he (Shaw) shall be entitled to have, receive or demand from the said Self-Seating Valve Company any payment whatsoever to him," Shaw, on account of any claim he then had against the company. In other words, the undertaking clearly entered into by him in executing this agreement, was that in consideration for a loan of \$6,000 in cash to be made to the company by Wiedemann, Jr., so that the company might thus be provided with funds to carry on its business and meet its current obligations, Shaw agreed that his claim

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of over \$80,000 against the company, should be subordinated to the claim of Wiedemann on the note which was to be given him for that loan, or to the claim anybody else would ever have against the company by reason of becoming the owner of that note. By executing this agreement Shaw did not become obligated to pay the note, either primarily or secondarily or in any other manner. It seems also to be the plaintiff's theory that Shaw breached this contract of his when he accepted the dividend from the trustee in bankruptcy on his claim for eighty odd thousand dollars, and that when he so breached the contract became liable unconditionally to pay the Valve Company's note in full. We are unable to see how such a contention can reasonably be made. All that Shaw agreed to in his contract is that if Wiedemann, Jr. will make the loan to the company, as set forth in the contract, then the note to be given by the company for that loan shall be paid in full by the company before he, Shaw, shall be entitled to have, receive or demand any payment from the company on his claim against it. In other words, he gives Wiedemann and his assigns, by this contract, the right to have the \$8,000 note paid in full before he shall receive anything from the company. The plaintiff contends that this was a "fair weather" contract and did not contemplate bankruptcy. If that is the case, the plaintiff is certainly out of court entirely because it is not contended, nor could it be, that Shaw either received or demanded anything from the Valve Company on the claims he had against it at that time. The only payments he has received on his claim are those which have come from the bankruptcy estate of the company through the trustee in bankruptcy, which is quite

of over \$100,000, which the company, should be established
to the state of Wisconsin on the new which was to be given
him for that loan, or to the state anybody else would ever
have against the company by reason of procuring the money
of that note. By executing this agreement then did not pay
was obligated to pay the note, either primarily or secondarily
it is in any other manner. It seems also to be the plain
will's theory that they intended this payment of the note
to liquidate the dividend from the proceeds of the company
the time for which was the same dollar, and that when so
it was made the interest should be paid accordingly to
the the time company's note is paid. The note might be paid
the same a liquidation was necessarily be made. All that they
agree to in the contract is that at Wisconsin, it will
make the loan to the company, so not to be in the contract,
then the note is to be given by the company for that loan shall
be paid in full by the company before the time shall be
relative to know, relative to which any payment from the
company on the note against it. In other words, no date
thereafter and the note, by this contract, the right to
have the note paid in full before he shall receive
repayment from the company. The liability concerns the
note and a full payment, relative to which any payment from
company. It was in the money, the liability is certainly
not an equal liability because it is not a contract, nor would
it be, that loan which involved in the contract stipulated that
the note should be paid before the note is paid to the
state. The only agreement is that payment on the note was
made which was from the company within of the
company through the trustee in bankruptcy, which is valid

a different thing from receiving payments from the company itself.

However, we are inclined to the opinion that this was not a "fair weather" contract, but was rather a contract which was to apply in case of bankruptcy, and provided that in that event, as between Shaw and the owner of the \$5,000 note, the latter was to have priority and receive the amount of the note in full before Shaw would have the right to participate in the division of assets.

The place for the exercise of the rights given to Wiedemann or his assigns, including the plaintiff, by Shaw in this so-called Shaw contract, was in the bankruptcy proceedings in the United States District Court. That court had full jurisdiction to put these rights into effect, as between these parties in the distribution of the assets of the bankrupt estate. The court had complete jurisdiction not only to administer the assets and allow^{OR} disallow claims against the bankrupt, but it also had complete jurisdiction to determine the question of priorities as between creditors, even though such a question might be presented as the result of an agreement entered into between two or more of these creditors. Searle v. Mechanics Loan & Trust Co., 242 Fed. 944; In re Desnoyers Shoe Co., 224 Fed. 372; In re George C. Bryne Co., 258 Fed. 840. In contending the contrary the plaintiff has called our attention to In re Girard Glazed Kid Co., 136 Fed. 511, and Stiras v. First National Bank of Columbus, 83 Neb. 182. In our opinion these cases fail to support the plaintiff's contention. In the Searle case

the court called attention to the fact that in the Girard Kid Co. case a contention was made similar to that which the plaintiff is making in the case at bar, and the court then proceeded to show that the Girard case was not applicable to the situation presented in the Searle case, in which the parties had expressly stipulated, by the terms of the agreement into which they had entered, that the claims of one of them should be first paid out of the assets, just as the defendant agreed in the case at bar in the Shaw contract. In the Searle case the court pointed out that owing to the fact that the agreement was not a general one among creditors, that the creditor in whose favor a lien against the assets was created could not enforce the lien against the whole of the bankrupt estate "but", the court proceeded to point out, "clearly the creditors who actually signed the agreement thereby created an equitable lien on their interest in the funds which thereafter came into the control of the bankrupt court for administration." So far as the Stires case is concerned it turned on the question of the construction of the contract therein presented and did not involve the question of the jurisdiction of the bankruptcy court to take into consideration and carry out the terms of a priority or subordination agreement between creditors. Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims ownership, passes at once into the custody of the court of bankruptcy and becomes subject to its jurisdiction to determine all adverse or conflicting claims thereto whether of title or liens. In our opinion, when not only Wiedemann, Jr., and

shaw, but even the plaintiff became parties in connection with the bankruptcy proceedings of the Valve Company, and all these parties filed claims against the bankrupt estate and when all these claims were allowed and demands paid thereon, without either Wiedemann, Jr. or the plaintiff raising any question, by way of objection to the allowance of Shaw's claims, to the effect that those claims were subject to the priorities created in the Shaw contract, they were thereafter forever barred from making any such contention. In other words, the allowance of the Shaw claims in the bankruptcy proceedings amounted to an adjudication between the parties of any rights which might have been claimed by any of them under the Shaw contract and any question of such rights is now res adjudicata between these parties. Spengler Commercial Club v. Hartness, 70 Ind. App. 294; 123 N. E. 425. The doctrine of res adjudicata applies not only to all such matters as were raised between the parties in the prior litigation but to such as might properly have been raised and decided between them in that litigation. Arrowsmith v. Old Colony Life Ins. Co., 180 Ill. App. 462.

Even if the plaintiff were not barred against prosecuting this action against the defendant by the application of the doctrine of res adjudicata, we are of the opinion that he could not recover in this action because it is clearly shown by the proof in this record that the priority rights which Shaw undertook to give to Wiedemann in the Shaw contract, were conditioned upon Wiedemann furnishing a consideration, which was specifically set forth, and

The above information was obtained from the records of the Bureau of Prisons, Department of Justice, Washington, D.C., and is being furnished to you for your information.

Sincerely,
[Signature]

Even if the majority were not so small, the
-prosecution this action against the defense of the right-
-action of the majority of the defendant, we are in the
-position that we could not proceed in this case because
-it is clearly shown by the facts in this case that the
-majority would have been satisfied to let the defendant
-in his own interest, were well-known to the defendant, and
-in a commission, which was conducted by the defendant, and

so far as the record shows he failed to furnish that consideration. This does not involve the question of whether the Valve Company received a consideration for its \$5,000 note. Of course it did receive a good and valuable consideration for that note when the proceeds of the discount of its note were credited to its loan account in the Logan Square Trust & Savings Bank. But that has nothing to do with the question of whether the consideration specified in the Shaw contract was thus furnished. That contract clearly recited that it was necessary for the Valve Company to raise \$5,000 in cash to meet its "current obligations" and "carry on its business", and that Shaw was desirous that a loan for that amount be accomplished from Wiedemann, Jr. to the Valve Company, "in order that it might have funds to carry on its business and meet its current obligations," and Shaw then proceeded to agree to afford Wiedemann certain priorities over him as a creditor, in consideration for his making the Company a loan in the sum named, "in order that it might have funds to carry on its business and meet its current obligations." In our opinion that consideration could be furnished by Wiedemann only by turning over to the Valve company the proceeds of the discount of this note, in cash or its equivalent, so that the company would have full custody of and control over those proceeds, and the opportunity of using them "to carry on its business and meet its current obligations," and, in our opinion, such consideration was not furnished when Wiedemann procured the discount of the Valve Company note and then deposited the proceeds of the discount in his own bank and credited that amount to the company's loan account in the bank, on

a note only a few days old and not due, under its terms, for nearly 90 days.

It appears that the plaintiff Blair and Trott have been sued by the First National Bank of Harvey on the note which they gave that bank when the Valve Company note was eliminated therefrom, and in connection with that case Blair has made two affidavits which, in our opinion, are wholly inconsistent with the contention and theory advanced by him in the case at bar, to the effect that he became the owner of the Valve Company note and the Shaw contract in April, 1922, and has remained the owner of those documents since that time. In these affidavits the plaintiff takes the position that the execution of the \$6,000 note by him and Trott, which was given to the First National Bank of Harvey, in April 1922, was purely an accommodation transaction and that he and Trott received nothing from the bank as a consideration for the execution of that \$6,000 note. In the case at bar, however, Blair contends that when he gave the First National Bank of Harvey that \$6,000 note, which was also signed by Trott, for the purpose of eliminating the Valve Company note from that bank, he, Blair, became the owner of that Valve Company note and the Shaw contract which accompanied it. If he did, he could of course not successfully contend that when he gave the \$6,000 note to the First National Bank of Harvey he received nothing for it. The two positions are utterly inconsistent, in our opinion.

The defendant contends that in view of the allegations made by the plaintiff Blair in these affidavits it

a note only a few days old and not due, which is correct, the
 money is lost.

It appears from the statement that the money was

drawn from the First National Bank of New York on the note

which they gave back when the First National Bank was

eliminated from the market, and in connection with that same

has made the affidavit which, in my opinion, are wholly

inconsistent with the contention and honest statement by him

in the case at law, to the effect that he knows the money

at the First National Bank and the money is lost.

Now, and has retained the money at that time, which is

also, in my opinion, the statement which is wholly

and the statement of the money is lost, which

was given to the First National Bank of New York, in April

1901, was given to the First National Bank of New York and was

not given to the First National Bank of New York as a contribution

and the statement is that the money is lost, which

is not correct, which statement was given to the

First National Bank of New York and was given to the

also given by the First National Bank of New York, which

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is shown that the plaintiff, as a matter of fact, is not the owner of the Valve Company note and the Shaw contract, as claimed by him in the case at bar, and that there are other facts shown in this record pointing in the same direction, such for instance as the fact that eight months after Blair now claims to have come to be the owner of the Valve Company note and the Shaw contract, Wiedemann, Jr. filed these very papers in the bankruptcy proceedings involving the Valve Company and in those proceedings he claimed to be the owner of the Valve Company note and the Shaw contract. In explanation of this seeming inconsistency, counsel for the plaintiff argues in this court that there was no reason why Wiedemann, Jr. should not file his claim on the Valve Company note and the Shaw contract in the bankruptcy proceedings "as the assigner thereof." The fact, however, is that he, according to the proof in this record, did not file his claim as the assigner of those documents and for the use of this plaintiff, but he filed the claim as the owner of those documents. The claim having been filed by Wiedemann on this note as owner, and the court having allowed a dividend to him in that capacity, we are of the opinion that the question of the ownership of the note is also res adjudicata. Upon all this proof, we are of the opinion that the finding of the trial court in the case at bar, to the effect that Blair was the owner of the Valve Company note and the Shaw contract, was against the manifest weight of the evidence.

For the reasons stated, the judgment of the Circuit

is shown that the plaintiff, as a matter of fact, is not
the owner of the Valve Company note and the show contract.
as claimed by him in the case at bar, and that there are
other facts shown in this record pointing in the same
direction, such for instance as the fact that eight months
after their non-alignment have come to be the owner of the
Valve Company note and the show contract, respectively.
Filed these facts, the plaintiff's position
involving the Valve Company and in those proceedings he
claimed to be the owner of the Valve Company note and the
show contract. In explanation of this seeming inconsistency,
counsel for the plaintiff argues in this court that there
was no reason why Wiseman, if he should not file his claim
on the Valve Company note and the show contract in the
bankruptcy proceedings "as the assignee thereof". The
fact, however, is that he, according to the record in this
case, did not file his claim as the assignee of those
documents and the fact of this is immaterial, but he filed
the claim as the owner of those documents. The claim having
been filed by Wiseman on this note as owner, and the court
having allowed a dividend to him in that capacity, we are of
the opinion that the question of the ownership of the note
is also res adjudicata. Upon all this proof, we are of
the opinion that the finding of the trial court in the case
at bar, to the effect that Blais was the owner of the Valve
Company note and the show contract, was against the weight
of the evidence.

For the reasons stated, the judgment of the District

is shown that the plaintiff, as a matter of fact, is not the owner of the Valve Company note and the Shaw contract, as claimed by him in the case at bar, and that there are other facts shown in this record pointing in the same direction, such for instance as the fact that eight months after Blair now claims to have come to be the owner of the Valve Company note and the Shaw contract, Wiedemann, Jr. filed these very papers in the bankruptcy proceedings involving the Valve Company and in those proceedings he claimed to be the owner of the Valve Company note and the Shaw contract. In explanation of this seeming inconsistency, counsel for the plaintiff argues in this court that there was no reason why Wiedemann, Jr. should not file his claim on the Valve Company note and the Shaw contract in the bankruptcy proceedings "as the assignor thereof." The fact, however, is that he, according to the proof in this record, did not file his claim as the assignor of those documents and for the use of this plaintiff, but he filed the claim as the owner of those documents. The claim having been filed by Wiedemann on this note as owner, and the court having allowed a dividend to him in that capacity, we are of the opinion that the question of the ownership of the note is also res adjudicata. Upon all this proof, we are of the opinion that the finding of the trial court in the case at bar, to the effect that Blair was the owner of the Valve Company note and the Shaw contract, was against the manifest weight of the evidence.

For the reasons stated, the judgment of the Circuit Court is reversed.

JUDGMENT REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

50369 - Blair vs Shaw

This page is substituted in lieu of the
page now misprinted in page 5 of
Opinion which was filed May 1st
also Page 1 on second line after
words for a judgment for \$700.00

-16-

Court is reversed with a finding of facts.

JUDGMENT REVERSED WITH A FINDING OF FACTS.

TAYLOR AND O'CONNOR, JR. JUDGES.

FINDING OF FACTS:

We find as facts that the plaintiff Blair was not
the owner of the Valve Company note and the Shaw contract;
that Wiedemann failed to furnish the consideration specified
in the Shaw contract, for the promise Shaw made in that
contract; and that Shaw did not breach the contract.

not a part of
the case

100-252- (Blair v. Blair)
The facts as stated in the
petition are not in dispute.
The court is reversed with a finding of facts.

JUDGMENT REVERSED WITH A FINDING OF FACTS.

TAYLOR AND O'BONNOR, JJ. CONCUR.

FINDING OF FACTS:

It is found as facts that the plaintiff Blair has not
the owner of the Valve Company note and the Blair contract;
the defendant failed to furnish the consideration specified
in the Blair contract, for the promise was made in that
contract, and that Blair did not breach the contract.

178 - 30439

GREGORY T. VAN WETER, Administrator
of the Estate of JOHN V. REARDON,
Deceased,

Appellant,

v.

YELLOW CAB COMPANY, a corporation
and LOUIS BAILEY,

Appellee.

211 T A. 623

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1936.

MR. PRESIDING JUSTICE THOMPSON delivered the
opinion of the court.

The plaintiff administrator brought this suit
under the Injuries Act, to recover damages caused by the
death of the deceased, John V. Reardon, which was alleged
to have been caused by injuries received by him as a
result of a collision between a Yellow Cab and another
automobile referred to in the record as a Dixie Flyer, which
was being driven by the defendant Bailey. At the close
of the plaintiff's case the court allowed a motion inter-
posed by the defendant Yellow Cab Company, and instructed
the jury to find that defendant was not guilty, and, no
further evidence being offered by any of the parties to the
cause, the court orally instructed the jury, on behalf of
the plaintiff, that they had heard all the testimony and that
there was no defense, "and you are instructed to find the
defendant, Louis Bailey, guilty and I give you a form of
guilty against the defendant, Louis Bailey and in that blank
space you will find the number of dollars that you will agree

SALE 174. 623

OFFICE OF THE CLERK OF THE DISTRICT COURT
OF THE DISTRICT OF COLUMBIA
WASHINGTON, D. C.

Appellate

APPEAL FROM

IN

THE

OF

CRIMINAL COURT

DOOR COURT

THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA
WASHINGTON, D. C.

THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Opinion filed May 5, 1926.

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the plaintiff is entitled to receive." The jury thereupon retired and later returned their verdict and fixed the sum of the plaintiff's damages at the sum of \$5,000. Judgment was entered in favor of the defendant, Yellow Cab Company, and against the defendant, Bailey. By this appeal the plaintiff seeks to reverse the judgment entered in favor of the defendant Yellow Cab Company.

It is the plaintiff's contention that there was evidence in the record tending to show the guilt of the defendant Yellow Cab Company as well as that of the defendant Bailey, and that it was, therefore, error for the trial court to give the jury a peremptory instruction directing them to find the issues in favor of the Cab Company. On the other hand it is the contention of the Cab Company that there was no evidence submitted by the plaintiff tending to make out a cause of action against it; that the only evidence in the record touching the question of how the deceased came to be injured was to the effect that the Dixie Flyer ran over him and that the collision which occurred between the Yellow Cab and the Dixie Flyer could not have been the cause of the injuries received by Reardon, because the evidence shows that that collision occurred after Reardon was run over by the Dixie Flyer and not before then, and that reasonable minds could not conclude otherwise from the evidence submitted by the plaintiff. The theory of the plaintiff's declaration is that a Yellow Cab belonging to the defendant Yellow Cab Company, collided with the Dixie Flyer, driven by the defendant Bailey, due to the negligence of the drivers of these two vehicles, and that as a result of this collision, so

[illegible]

caused by the negligence of the drivers of the two cars, the Dixie Flyer ran into the deceased, causing the injuries complained of.

The occurrence involved in this case happened on the west side of Wentworth avenue, a little north of its intersection with 38th street, in the City of Chicago. It appears that repairs of some kind were being made in Wentworth avenue and all of that street, east of the east rail of the southbound street car track, was not available for the use of vehicles, and that the west side of the street was being used by both the north and south bound traffic. It appears further that the deceased, with a partner of his engaged in the automobile repair business, had been towing a Dodge sedan south in Wentworth avenue in the roadway on the west side of that street and they had become stalled 100 feet or so north of 39th street. It was about 5:30 in the afternoon of November 11th and it was dark but the street lights were lighted and certain flares had been established along the west edge of the excavation in Wentworth avenue. It appears further that the lights were lighted on the sedan, and the deceased and his partner were engaged in removing some broken gears from the rear shaft of the sedan. The partner of the deceased was kneeling in the street at the rear end of the Dodge sedan, working at the gears, and the deceased was squatting down holding a light, immediately east of his partner and between his partner and the left rear wheel of the sedan. The Yellow Cab was being driven north in the south bound track in Wentworth avenue. It was following a Ford car and was going at a rate of 12 to

[illegible]

15 miles an hour, according to one of the witnesses, and 15 to 20 miles, according to another witness. The Dixie Flyer was being driven south in the west roadway of Wentworth avenue, and just after passing the north bound Ford, Bailey, who was driving the Dixie Flyer, and who was approaching close to the sedan, swung out onto the south bound street car track so as to pass the sedan. As he did so, but just at that point is not clear from the record, he collided with the Yellow Cab. When he came to a stop, the rear of his car was about even with the rear of the sedan, the right rear wheel of the Dixie Flyer being about opposite the left rear wheel of the sedan. The deceased had apparently been run over by the Dixie Flyer. The partner of the deceased said he did not know what happened but when the Dixie Flyer came to a stop its right rear wheel "was by the left rear wheel of the Dodge sedan and the deceased was lying on his stomach, his head toward the east with the upper part of his body" lying in the rear of the right rear wheel of the Dixie Flyer, - "it was north of the rear wheel, right back of the rear. The rest of his body was back of the Dodge sedan. The Yellow Cab was in the neighborhood of 10 feet north of the Dixie Flyer, facing north. The left front fender of the Yellow Cab was smashed, all dented in and the left part of the front axle of the Dixie Flyer was smashed. I did not see the collision." This witness also testified that "the Dodge sedan was moved about four feet."

One Rasmussen, who was riding in the Dixie Flyer, testified that they had "a head-on collision;" that

1177. Testified that they had a horse on collision, and
 1178. The respondent, who was riding in the bike
 1179. that was being driven south in the west roadway of
 1180. the street, and that after passing the north bound
 1181. Ford, Miller, who was riding the bike, they, and who
 1182. was approaching along the south, swung out onto the
 1183. south bound street and that as he went the
 1184. as he did so, was just at that point in and about that
 1185. the street, he collided with the Miller. When he
 1186. was to a stop, the rear of his car was about over the
 1187. the rear of the motor, the right rear wheel of the bike
 1188. being about opposite the left rear wheel of the
 1189. motor. The defendant had apparently been seen by the
 1190. witness. The position of the defendant said he did not
 1191. know what happened and when the bike rider came to a stop
 1192. the right rear wheel was by the left rear wheel of the
 1193. Ford's motor and the defendant was lying on his stomach, his
 1194. head toward the east with the upper part of his body
 1195. lying in the rear of the right rear wheel of the bike
 1196. rider. - It was north of the rear wheel, right back of
 1197. the motor. The rear of his body was back of the Ford's
 1198. motor. The Miller was in the neighborhood of 10 feet
 1199. north of the bike rider, facing north. The left front
 1200. wheel of the Miller was on the street, it looked as if the
 1201. left part of the front wheel of the Miller was on the
 1202. street and the Miller. The witness also testified
 1203. that the bike rider was "knocked off his feet."

the Dixie Flyer was running about 15 miles an hour and the Yellow Cab about 14 or 15 miles an hour at the time of the collision; that after the collision "there was a car alongside of the Dixie Flyer, - the impact might have thrown it off as they crowded together." This witness was asked whether the Dixie Flyer and the Dodge sedan "were standing abreast of each other or standing as it were --." At this point in the question counsel for the Yellow Cab Company interposed an objection on the ground that the question called for a conclusion. Without attempting to reframe the question, counsel for the plaintiff stated that he was trying to get the opinion of the witness as to how far the Yellow Cab was from the curb. Counsel for the Yellow Cab Company then observed that this was not a subject on which opinion evidence was competent. The court agreed with counsel and sustained the objection. In our opinion the objection should have been overruled. It was entirely proper for the witness to state how far, in his opinion, the Yellow Cab was from the west curb of the street, and in order for him to testify on that subject it was not necessary for him to have measured the distance. Another witness who was riding in the Dixie Flyer testified that as they were going south along Ventworth avenue "the Yellow Cab hit us;" and also that "they collided with Mr. Beardon's car," which was standing on the west side of the street. The cross-examination of this witness then shows the following: "Q. When did you collide with Mr. Beardon's car? A. After the Yellow Cab hit us. Q. After you were hit? A. After the Yellow hit us." This

[illegible]

witness admitted that he testified at the coroner's inquest to the effect that the first time he saw the Yellow Cab was when he got out of the Flyer and that he did not see it before then and knew nothing about the accident until he got out of the Flyer. At most, this went to the weight of the testimony of this witness and was to be given consideration by the jury in that connection.

The defendant, Bailey was called as a witness by the plaintiff and he testified that he was going south on the west side of Wentworth Avenue about 15 miles an hour and collided with the Yellow Cab as it was coming north about 15 or 20 miles an hour; that after the collision there was a car (the Dodge sedan) along side of his car. He was asked whether his car came in contact with that car and he answered just as a previous witness had, that "the impact might have thrown it off so that they crowded together." He was then asked, "That was after the collision with the taxi-cab?" and he answered, "Yes, sir." He further testified that he turned to the left to get back on the track and he cleared the Dodge sedan with his running board about five feet.

In our opinion it was error for the trial court to take this case from the jury as to the defendant Yellow Cab Company, on the foregoing evidence. There was sufficient to take the case to the jury, on the question of whether the proof tended to establish the allegations set forth by the plaintiff in his declaration. That a collision occurred between the Yellow Cab and the Dixie Flyer is

Witness admitted that he testified at the coroner's inquest
on the effect that the first time he saw the Yellow Cab
was when he got out of the River and that he did not see it
before then and knew nothing about the accident until he
got out of the River. As soon as he went to the witness
the testimony of this witness was to be given concern-
ing by the jury in that connection.

The defendant, Bailey, was called as a witness
by the plaintiff and he testified that he was going
south on the west side of Webster's Avenue about 12 miles
he got and collided with the Yellow Cab as it was coming
north about 15 or 20 miles an hour. That after the col-
lision there was a box (the badge wagon) along with it
and that he was asked whether his car was in contact
with that car and he answered that as a provision witness
that was the answer and that he was not in contact
they traveled together. He was then asked "Was the Yellow
Cab in contact with the badge wagon and he answered, "Yes."
The witness testified that he returned on the 10th
to get back on the track and he alleged the badge wagon
with the yellow cab about that date.

In the case of the Yellow Cab the jury found
in favor of the Yellow Cab and the defendant's Yellow
Cab, on the foregoing evidence. There was no evi-
dence to show the case to the jury, on the question of whether
the Yellow Cab was in contact with the badge wagon and that
by the plaintiff as its investigation. That a collision
occurred between the Yellow Cab and the badge wagon is

admitted. We do not agree with the contention of counsel for the Yellow Cab Company, to the effect that no reasonable inference could be drawn from the testimony, to the effect that Heardon was run over by the Dixie Flyer after the collision. Nor do we agree with the argument advanced, to the effect that the only effect of the collision on the Dixie Flyer could have been to knock the latter car to the north, and inasmuch as the deceased was found to be lying north of the rear wheel of the Dixie Flyer after it came to a stop, it must follow that the collision could not have been the proximate cause of the Dixie Flyer running over the deceased. In other words, the evidence should have been submitted to the jury on the question of whether the collision was or was not the proximate cause of the Dixie Flyer striking or running over the deceased, by causing the Flyer to pass closer to the sedan than would have been the case had there been no collision. The evidence tended to show that the Dixie Flyer bumped into the sedan and moved it four feet and when the Dixie Flyer came to a stop its right rear wheel was alongside of the left rear wheel of the sedan and the deceased, who had been squatting down immediately behind and to the rear of the left rear wheel of the sedan, before it was moved, was lying in the street with the upper part of his body immediately behind the right rear wheel of the Dixie Flyer.

It may well be, as counsel for the Yellow Cab Company contend, that the defendant Bailey was negligent in driving his car out onto the south bound street car track, in the manner he did, but the jury might also reasonably find from

this evidence that it was also negligence for the Yellow Cab driver to drive his cab north in the south bound street our track at the rate he did in view of all the surrounding circumstances, and that the injuries to the deceased were proximately brought about as a result of the collision which was occasioned by both of these acts of negligence.

For the reasons stated, the judgment of the Superior Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

THE UNIVERSITY OF CHICAGO

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

345 - 30508

ANTHONY BATEK,

Appellant.

v.

HAROLD E. GOODWIN,

Appellee.

211 624

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The plaintiff Batek brought this action against the defendant Goodwin to recover damages for an alleged assault and battery. The issues were submitted to a jury and they returned a verdict finding the issues for the defendant. Judgment was entered accordingly, to reverse which the plaintiff has perfected this appeal.

Together with his plea of the general issue, the defendant gave notice of certain special defenses. Thus, under the statute, the issues were the same as though they had been formed as a result of the filing of special pleas incorporating these defenses referred to in his notice. There were two such special defenses pleaded in the case at bar. First, the defendant contended that the plaintiff was a trespasser upon his premises, and when the defendant told him to leave he refused to do so, whereupon, the defendant used the force complained of, to put him off the premises, and only such force as was reasonably necessary to accomplish that result. Second, the defendant further contended that the force he used against the plaintiff was exercised by

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Opinion filed May 2, 1928.

MR. JAMES H. HARRIS, JR., Plaintiff, vs. JAMES H. HARRIS, JR., Defendant.

Plaintiff's Motion for Summary Judgment.

The plaintiff is a resident of the State of New York. He is a man of mature years, of good character, and of high intelligence. He is a man of high standing in his community, and is a man of high standing in his profession. He is a man of high standing in his community, and is a man of high standing in his profession. He is a man of high standing in his community, and is a man of high standing in his profession.

Together with his wife, the plaintiff has a family of four children. The plaintiff is a man of high standing in his community, and is a man of high standing in his profession. He is a man of high standing in his community, and is a man of high standing in his profession. He is a man of high standing in his community, and is a man of high standing in his profession. He is a man of high standing in his community, and is a man of high standing in his profession.

him in self defense and that he only used such force as was reasonably necessary to defend himself.

That the defendant assaulted the plaintiff as the latter alleged in his declaration was admitted by the defendant, who, in the course of his testimony stated freely that he had struck the plaintiff in the face and knocked him down three times. The real issue which the jury was called upon to decide in this case had to do entirely with the special defenses interposed by the defendant, and that issue was the subject of contradictory testimony submitted by the respective parties and their witnesses. The plaintiff submitted evidence tending to show that the force used by the defendant in his assault upon the plaintiff was considerably more than was necessary to eject the plaintiff from the defendant's premises, and that part of it was exerted after the plaintiff was off the premises. The evidence submitted by the defendant tended to show the contrary. Similarly the plaintiff submitted evidence tending to show that he at no time struck the defendant or made any motion indicating that he was about to attempt to draw a weapon, and further, that he bore a good reputation for peace and quiet in the neighborhood; while the defendant, on the other hand, submitted testimony tending to show that the plaintiff's reputation for peace and quiet, was bad; that it was reputed that he carried a knife on his person for use in such situations as the one involved here; and that he did assume a threatening attitude and make a motion which indicated he was about to draw a weapon.

Such being the state of the record, it was particularly important that the jury be correctly instructed, and that

him in such manner and that he only read what was written
was reasonably necessary to defend himself.

That the defendant admitted the plaintiff as

the latter alleged in the testimony was admitted by the
defendant, who, in the course of his testimony, stated that
that he had struck the plaintiff in the face and knocked him
down three times. The fact that the jury was called
upon to decide in this case had to do exclusively with the
question of damages, as proposed by the defendant, and that
there was no question of contradictory testimony submitted
by the respective parties and their witnesses. The plaintiff
did not submit evidence tending to show that the force used
by the defendant in his assault upon the plaintiff was

unreasonably more than was necessary to effect the plaintiff's
escape from the defendant's premises, and that part of it was
excluded after the plaintiff was off the premises. The
evidence submitted by the defendant tended to show the same
force. Similarly the plaintiff submitted evidence tending to

show that he did not intend to do any harm or injury
and that he was not about to attempt to do so
and, further, that he was a good reputation for peace
and quiet in the neighborhood, while the defendant, on the
other hand, submitted testimony tending to show that the
plaintiff's reputation for peace and quiet was bad; that
it was reported that he carried a knife on his person for
use in self-defense on the one hand, and that
he did have a conversation with a woman with
intent to seduce her to that effect.

Such being the state of the record, it was held that
it was error to grant a new trial, and that

the statements made to them in instructions, as to what the law was, applicable to the situation presented on the issue which they were called upon to decide, be accurate. This was particularly important with regard to the question of the burden of proof. While we are of the opinion that the contention of the plaintiff in support of his appeal, to the effect that the verdict and judgment are against the manifest weight of the evidence, is untenable, and we would not be disposed to disturb this judgment if there were no procedural errors, we are further of the opinion that one of the instructions, given on the question of burden of proof, was such as to necessitate a re-trial of this case.

In the course of the instructions the court, at the defendant's request, told the jury that "the burden of proof in this case is upon the plaintiff and in order to justify a verdict in his favor you must be convinced by a greater weight of preponderance of the evidence that the issues are with the plaintiff." As applied to this case, that instruction was misleading, if not erroneous. While it is true that upon the issues, as made up by the declaration and the plea of not guilty, the burden of proof was upon the plaintiff, it is also true that on those issues occasioned by the affirmative defenses which the defendant sought to interpose, the burden of proof was upon the defendant. It is further true that as the cause was submitted to the jury, all questions on which the plaintiff had the burden of proof were admitted and the only issues as to which there was any controversy, calling for the consideration of the jury, were those occasioned by the affirmative defenses. This made the instruction complained of particular-

the statements made to them in instructions, as to what the law was, applicable to the situation presented on the issue which they were called upon to decide, in accordance. This was particularly important with regard to the question of burden of proof. While we are of the opinion that the contention of the plaintiff in support of his appeal, to the effect that the verdict and judgment are against the manifest weight of the evidence, is untenable, and we would not be disposed to disturb this judgment if there were no procedural errors, we are further of the opinion that one of the instructions, given on the question of burden of proof, was such as to necessitate a retrial of this case.

In the course of instructions the court, at the defendant's request, told the jury that "the burden of proof in this case is upon the plaintiff and in order to justify a verdict in his favor you must be convinced by a preponderance of the evidence that the issues are with the plaintiff." As applied to this case, that instruction was misleading, if not erroneous. While it is true that upon the issues, as made up by the defendant and the plea of not guilty, the burden of proof was upon the plaintiff, it is also true that on those issues occasioned by the affirmative defenses which the defendant sought to interpose, the burden of proof was upon the defendant. It is further true that as the issues were submitted to the jury, all questions on which the plaintiff had the burden of proof were submitted and the only issues as to which there was any controversy, calling for the consideration of the jury, were those occasioned by the affirmative defenses. This made the instruction complained of prejudicial.

ly misleading. In Vol IV of Wigmore on Evidence, par. 2486, the author, in referring to the justifying circumstances of self defense, when interposed in an action of tort, points out that "the plaintiff has but to prove the nature of his harm and the defendant's share in causing it; and the other circumstances, which would, if they existed, leave him (plaintiff) without a claim, are put upon the defendant to prove." In Vol. II of Greenleaf on Evidence, par. 95, the author says that under a plea of self defense and an appropriate replication, "the burden of proof is on the defendant, who will be bound to show that the plaintiff actually committed the first assault and also that what was thereupon done on his own part, was in the necessary defense of his person." In the first volume of Jones on Evidence, paragraph 178, that author says that "the burden of proving any given claim or defense rests upon the one who asserts it." And in the preceding paragraph this author says that it is incumbent upon the defendant to establish an affirmative defense if he alleges it. In Vol. III of Starkie on Evidence, page 1473, the author states that in case of a plea of self defense with an appropriate replication, "the proof is, of course, upon the defendant * * *."

In Gizler v. Witzel, 52 Ill. 332, which was an action of assault and battery in which there was a plea of self defense, the court instructed the jury that the burden of proof was upon the defendant to establish by a preponderance of the evidence that the assault was made in necessary self defense, as he had alleged, and also that in making the assault the defendant used no more force than was necessary to protect himself. The Supreme Court held that the

is misleading. In Vol IV of *Williams on Evidence*, par. 1400, the author, in referring to the "justifying circumstances" of self defense, which interested in an action at tort, writes that "the plaintiff has not to prove the nature of his harm and the defendant's share in causing it; and the other circumstances, which would, if they existed, leave him (plaintiff) without a claim, are put upon the defendant to prove." In Vol. II of *Williams on Evidence*, par. 35, the author says that under a plea of self defense and an appropriate replication, "the burden of proof is on the defendant, who will be bound to show that the plaintiff actually committed the first assault and also that that was the person who on his own part, was in the necessary defense of his person." In the first volume of *James on Evidence*, paragraph 118, that author says that "the burden of proving any given claim or defense rests upon the one who asserts it." And in the preceding paragraph this author says that it is incumbent upon the defendant to establish an affirmative defense if he alleges it. In Vol. III of *James on Evidence*, page 1475, the author states that in case of a plea of self defense with an appropriate replication, "the proof is, of course, upon the defendant."

It was in *Allen v. Wright*, 33 Ill. 328, which was an action of assault and battery in which there was a plea of self defense, the court instructed the jury that the burden of proof was upon the defendant to establish by a preponderance of the evidence that the assault was made in necessary self defense, as he had alleged, and also that in making the assault the defendant used no more force than was necessary to protect himself. The Supreme Court held that the

instruction was correct. Gisler v. Bitzel is cited by the author, in Chamberlayne's Edition of Best's Principles of Evidence, in a foot note on page 274, where that author says, "Burden of proof in the sense of burden of establishing, remains unchangingly throughout the entire case exactly where the pleadings originally place it. It never shifts, under any circumstances whatever. The party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue, has the burden of proof. It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence, by whomsoever interposed, is all in, if he " (whether he be plaintiff or defendant)" has not, by a preponderance of the evidence required by law established his position or claim, the decision of the tribunal must be adverse to such pleader."

In Hulse v. Tollman, 43 Ill. App. 490, which was a similar action with similar pleadings, the court told the jury that the burden of proof rested on the plaintiff and that before he would be entitled to a judgment he must prove his case by a preponderance of the evidence. Thus the situation in that case was exactly like the one presented here. The court said, "the assault by defendant was admitted and the burden of proving that it was committed in self defense was on the defendant. It was stipulated that all pleas were in, and the defendant undertook to establish a plea of self defense, under which the burden was on him. The instruction was wrong in casting the burden of proof on all the issues on the plaintiff."

instruction was correct. Miller v. Miller is cited by the author, in Chamberlain's Edition of West's Principles of Evidence, in a foot note on page 374, where that author says, "Burden of proof in the sense of burden of establishing, remains unchanged throughout the entire case except if there the plaintiff originally places it. It never shifts, under any of circumstances whatever. The party, who substantially asserts the affirmative of the issue, has the burden of proof. It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence, by whom ever introduced, is all in, it is (whether he be plaintiff or defendant)" has not, by a preponderance of the evidence required by law established his position or claim, the burden of the trial must be adverse to such plaintiff."

In Miller v. Miller, 40 Ill. App. 400, which was a similar action with similar pleadings, the court told the jury that the burden of proof rested on the plaintiff and that before he would be entitled to a judgment he must prove his case by a preponderance of the evidence. Thus the situation in that case was exactly like the one presented here. The court said, "the account by defendant was admitted and the burden of proving that it was committed in self defense was on the defendant. It was stipulated that all pleas were in, and the defendant undertook to establish a plea of self defense, under which the burden was on him. The instruction was wrong in casting the burden of proof on all the issues on the plaintiff."

Other cases of a similar nature, presenting the same question are Swigart v. Ballou, 106 Ill. App. 226; Wells v. Englehart, 118 Ill. App. 220; Kehl v. Burgner, 157 Ill. App. 468; Spenler v. Turley, 158 Ill. App. 146; and Reimenschneider v. Nusis, 175 Ill. App. 172. The holdings in all these cases are to the same effect, namely, that where, in such an action as the one at bar, the defendant pleads self defense, the burden of proof is upon him to establish such defense by a greater weight of the evidence. In the Wells case the court said, "The fact that a plea of not guilty was also filed does not change the situation in this respect. On the issue raised by the special plea the burden is still with the defendant." In the Kehl case, the defendant not only interposed the affirmative plea of self defense but filed a plea of the general issue and apparently insisted upon the trial that what was done did not amount to an assault. The court held that the burden of establishing the assault was upon the plaintiff but "the burden of justifying the assault under the special plea" was upon the defendant. In the Spenler case, it was urged that the trial court had erred in refusing an instruction by which it was sought to tell the jury, in substance, that if they believed the plaintiff made the first assault, the burden was cast upon him to show by a preponderance of the evidence that the defendant used more force than a reasonably prudent man would have deemed necessary for his defense, under similar circumstances. It was held that this instruction had been properly refused, and the court said that by the plea of self defense, "the defendant assumed the burden of proving not only that the plaintiff first assaulted him and that he, the defendant, acted in necessary self defense, but also that

the defendant, asked in necessary self defense, but also that
not only that the plaintiff lived assaulted him and that he,
self defense, "the defendant assumed the burden of proving
properly refused, and the court said that by the plea of
manslaughter. It was held that this instruction had been
have deemed necessary for his defense, under similar cir-
stances need not force them a reasonably prudent man would
him to show by a preponderance of the evidence that the de-
fendant made the first assault, the burden was cast upon
to tell the jury, in substance, that it they believed the
had acted in returning an instruction by which it was sought
and. In the Foran case, it was held that the trial court
ing the assault under the special plea was upon the defend-
the assault was upon the plaintiff and "the burden of justify-
an assault. The court held that the burden of establishing
imposed upon the trial that what was done did not amount to
defense but filed a plea of the general issue and apparently
defendant not only introduced the affirmative plea of self
defense is still with the defendant. In the Kohl case, the
this request. On the issue raised by the special plea the
guilty was also filed does not change the situation in
Hein was the court said, "The fact that a plea of not
such defense by a greater weight of the evidence. In the
self defense, the burden of proof is upon him to establish
such an action as the one at bar, the defendant pleads
these cases are to the same effect, namely, that where, in
Smith v. Smith, 178 Ill. App. 173. The holding in all
App. 488; Foran v. Taylor, 188 Ill. App. 148; and Hein
v. Smith, 188 Ill. App. 280; Kohl v. Hein, 187 Ill.
some question are Smith v. Smith, 188 Ill. App. 280; Hein
Other cases of a similar nature, presenting the

in defending himself he used no more force than was necessary. Ayers v. Kelley, 11 Ill. 17; Gisler v. Witsel, 82 Ill. 322."

The plaintiff also complains of the action of the trial court in refusing an instruction tendered, which covered the proposition that spoken words do not justify an assault. In our opinion this instruction as submitted was clearly bad for a number of reasons. It was merely an abstract proposition of law, and further, it was a part of a lengthy instruction which, as drawn, could hardly help being confusing. It purported to state what the facts were and did not leave the jury to find the facts from the evidence. The subject was a proper one for the jury to be instructed upon in this case, as the proof clearly showed that the plaintiff used considerable rough language at the time of the occurrence involved, and on a re-trial the jury should be given a proper instruction on this question.

Because of the giving of the instruction on the question of the burden of proof, the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'DONNOR, JJ. CONCUR.

The plaintiff also complains of the action of the trial court in refusing an instruction submitted which covered the proposition that spoken words do not justify an assault. In our opinion this instruction as submitted was clearly bad for a number of reasons. It was merely an abstract proposition of law, and further, it was a part of a lengthy instruction which, as drawn, could hardly help being confusing. It purported to state that the facts were and did not leave the jury to find the facts from the evidence. The subject was a proper one for the jury to be instructed upon in this case, as the exact identity showed that the plaintiff used considerable rough language at the time of the occurrence involved, and on a re-trial the jury should be given a proper instruction on this question.

[illegible]

272 - 30534

THOMAS J. TOBIN,

Appellee,

v.

H. ARCHIBALD HARRIS, doing
business as Archibald Harris
& Co.,

Appellant.

241 11 224

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1936.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

The plaintiff Tobin brought this action against
the defendant Harris, doing business as Archibald Harris
& Company, seeking to recover a balance alleged to be due
him on account of unpaid commissions which he claimed he
was entitled to under a contract covering the employment
of the plaintiff by the defendant as an accountant.

The plaintiff filed a declaration consisting
of the common counts together with a copy of the account
sued upon. In his affidavit of the amount due the plain-
tiff stated that his demand was for "moneys which became
and were due to him on the 20th day of October, A. D. 1933,
earned as commissions in soliciting business for said de-
fendant, while in his employ" and was for the sum of \$4236.11.
The defendant filed a plea of the general issue and an
affidavit of merits. The issues were submitted to a jury,
resulting in a verdict for the plaintiff assessing his damages
at the full amount sued for. Judgment followed accordingly.

241 I.A. 624

APPEAL FROM

SUPERIOR COURT

THOMAS S. WORTH

Appellee

v.

WILLIAM S. WORTH
Plaintiff in Error

Appellant

Opinion filed May 3, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the

opinion of the court.

The plaintiff herein brought this action against

the defendant herein, doing business as the "Hotel de Ville"

and asking to recover a balance claimed to be due

him as account of unpaid consideration which he claimed he

was entitled to under a contract covering the employment

of the plaintiff by the defendant as an accountant.

The plaintiff filed a declaration consisting

of the common counts together with a copy of the account

made upon. In his affidavit of the amount due the plain-

tiff stated that his account was for services rendered

and was due to him on the 20th day of October, A. D. 1923.

It was admitted in the declaration that the plaintiff

was an accountant in soliciting business for said de-

fendant, while in his capacity and was for the sum of \$2500.00.

The defendant filed a plea of the general issue and an

affidavit of denial. The issues were submitted to a jury.

Verdict in a verdict for the plaintiff assessing his damages

at the full amount sued for. Judgment followed accordingly.

to reverse which the defendant has perfected this appeal.

The only contention advanced by the defendant in support of his appeal is that, taken in its most favorable aspect, the evidence did not warrant the submission of the count, based on an account stated, to the jury, and therefore the trial court erred in denying the motion of the defendant, submitted at the close of the plaintiff's case, requesting that all the evidence, in reference to the account stated, be stricken.

In our opinion, the contention made is without merit.

There is a sufficient showing in the record to uphold the judgment on the other counts. Scott v. The Parlin & Orendorff Co., 245 Ill. 460. The evidence is to the effect that the defendant's own books showed he was indebted to the plaintiff in the amount of the judgment. No evidence was submitted to the contrary.

For the reasons stated the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

to reverse which the defendant has persisted this appeal.

The only contention advanced by the defendant in support of his appeal is that, taken in its most favorable aspect, the evidence did not warrant the substitution of the verdict, based on testimony stated, in the jury, and there-
fore the trial court erred in denying the motion of the de-
fendant, submitted at the close of the plaintiff's case,
requesting that all the evidence, in reference to the account

IN THE COURT OF THE

IN THE COUNTY OF ...

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287 - 30549

MOTOR CAR SECURITIES CORPORATION,
a corp.,

Appellant,

v.

H. B. LOGAN and G. N. RINGQUIST,
doing business as LAKE SHORE
AUTO REPAIR,

Appellees.)

24173 624

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

The plaintiff corporation brought this action
of replevin against the defendants on December 19, 1923, to
recover possession of a Hudson automobile. The replevin
writ was issued on the same day and under the writ the
Sheriff took possession of the automobile and turned it
over to the plaintiff. Among other pleas, the defendants
interposed special pleas in which they set forth that the
automobile was the property of one Schroeder, who had
delivered it to the defendants to be repaired and that
they had put repairs into the car to the extent of \$520.05,
which amount remained unpaid and that they were therefore
entitled to the possession of the car as security for such
payment. In the replication filed by the plaintiff it was
set forth that the car was not the property of Schroeder,
but of the plaintiff by virtue of a lien which the plain-
tiff had on the car, in the shape of a chattel mortgage,
which had been duly executed by Schroeder, and recorded in
the Recorder's Office of Cook County, within the time

prescribed by law, which mortgage had been given by Schroeder to secure a balance of \$848.78, he still owed on the purchase price of the car; that one of the payments represented by this indebtedness, fell due and was not paid and that the plaintiff had exercised its option, under the terms of the chattel mortgage, and had elected to declare all the balance of said purchase price immediately due and payable.

The issues thus formed were submitted to the trial court without a jury. The evidence showed that one Steck had been the proprietor of a garage and repair shop, which was purchased by the defendants from him about December 1, 1923. This was several months after Schroeder had purchased the car in question and had given his notes and chattel mortgage to secure the balance due on the car and the chattel mortgage had been duly recorded. It appeared that when the defendants acquired the garage from Steck, the car had been brought in for repairs and was in the garage for that purpose. The contention of the defendants is that they repaired this car some time between the first and sixteenth of December.

The defendants contend in support of the judgment appealed from that the evidence shows that no demand was made by the plaintiff before this replevin action was instituted and therefore the plaintiff is not in a position to recover. The evidence on this question of the demand was in direct conflict. The plaintiff introduced evidence tending to show that such a demand was made, whereas the defendants each testified to the contrary. In our opinion the question of whether or not a demand was in fact made, is unimportant.

presented by law, which was given by the
to a balance of \$100.00, he will give on the
also him of the copy that one of the persons represent-
ed by this instrument, told him and was not told and that
the liability had entered its office, under the name of
the other party, and had elected to declare all the
balance of said person's name immediately into a mortgage.

The interest then turned was submitted to the
trial court about a jury. The witness about that the
person had been the proprietor of a garage and repair shop,
which was purchased by the defendant from him about December
1, 1902. This was several months after the defendant had pur-
chased the car in question and had given him notes and
mortgage to secure the balance due on the car and
the mortgage had been duly recorded. It happened
that when the defendant entered the garage from the
car had been brought in for repairs and was in the
garage for that purpose. The defendant of the defendant
in that day recalled that one came along between the lines
and defendant of defendant.

The defendant stated the amount of the balance
appearing from that the witness stated that he had been
sent by the defendant before the witness called was in the
told me however the liability as set in a position of
power. The witness on this question of the amount was in
these matters. The liability instrument with some other
in that that a check was sent, which the witness
and recalled of the witness. In that matter the witness
of matter in that a check was sent, which the witness

We have previously had occasion to hold in National Bond & Investment Co. v. Zakos, 230 Ill. App. 608, that "in an action of replevin or trover, no demand is necessary before bringing suit where the evidence discloses that such a demand would have been unavailing. The object of a demand is to afford the defendant an opportunity to restore the property to the one entitled to possession without being put to the expense and annoyance of litigation. But where it appears that the defendant either before the action was instituted or upon the trial, contests the plaintiff's rights upon the merits, or where it appears that a demand would have been of no avail, then none is required, for the law never requires the doing of a useless thing." It clearly appears from the evidence in the record that the defendants were claiming the right to retain the possession of this car and they sought to maintain that position on the trial of this case. Under such circumstances it was not necessary for the plaintiff to make a demand before bringing this action.

It clearly appears from the record that the plaintiff had a lien on this automobile, which was superior to that of the defendants. Ehrlich v. Chapelle, 311 Ill. 467. In our opinion the trial court erred in finding the right of property in this automobile in the defendants. That was even more than they claimed. It was their contention that the right of property was in Schroeder. In our opinion the trial court should have found that the plaintiff was entitled to retain possession of the car.

It was previously held in People v. ...

People v. ..., 188 N.Y. 484, 80 N.E. 2d 1011.

action of negligence on the part of the defendant is necessary before

liability can be established. The object of a demand

is to obtain compensation for the injury sustained.

liability in the case is established by the evidence.

that the defendant was negligent in the operation of the vehicle.

It appears that the defendant's negligence was the cause of the accident.

liability on the part of the defendant is established by the evidence.

liability on the part of the defendant is established by the evidence.

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liability on the part of the defendant is established by the evidence.

The defendants call our attention to the fact that it appears from the face of the declaration and of the replevin writ that certain alterations and erasures have been made in these documents. In our opinion this contention is without merit. It is quite apparent that such alterations and erasures have been made but there is nothing whatever in the record to indicate, nor do the defendants intimate, that these alterations were made after these documents were filed. It is apparent that it was first thought that the proceedings instituted by the plaintiff, to recover this automobile, would be against the former owner of the garage and repair shop, Steck, but when it was discovered that the garage and repair shop had changed hands and come to be the property of the defendants, it became necessary to make these changes. Defendants also make the point that the chattel mortgage held by the plaintiff, although executed by Schroeder, was acknowledged before the Clerk of the Municipal Court of Chicago by one Guthardt, as attorney in fact, for Schroeder, pursuant to what purports to be a power of attorney attached to the chattel mortgage, which is an undertaking by Schroeder to make Guthardt his attorney in fact for this purpose, but that this power of attorney as indicated by the certified copy introduced in evidence, (the original having been lost) was signed "H. Schroeder." In our opinion this contention is also without merit. The power of attorney above referred to is immediately followed by an acknowledgment in which one Spring, a notary public, certifies "that H. Schroeder, the mortgagor, personally known to me to be the same person who executed the foregoing power of attorney, appeared before me this day in

person and acknowledged that he signed, sealed and delivered said instrument as his free and voluntary act, for the uses and purposes therein set forth."

For the reasons stated the judgment of the Superior Court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

THESE ARE THE ONLY TWO COPIES OF THE
ORIGINALS OF THE TWO DOCUMENTS.

RECEIVED BY THE DIRECTOR, FBI, WASHINGTON, D.C., MAY 19, 1964

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

THE CITIZENS NATIONAL BANK OF
HOWLING GREEN, KENTUCKY, a corp.,

Appellee,

v.

ALVIN E. BEAR, doing business as,
etc.,

Appellant.

211111
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 5, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

By this appeal the defendant Bear seeks to reverse a judgment for \$855.12, recovered by the plaintiff bank in the Municipal Court of Chicago, on two promissory notes, in which Bear was the maker and one Turner the payee, the latter having endorsed the notes in blank. At the close of all the evidence the court instructed the jury to find the issues for the plaintiff. In support of his appeal the defendant contends that the evidence was such as to require that the issues be submitted to the jury, and that the trial court therefore erred in directing a verdict. The bank introduced the notes, together with proof that they were not paid at maturity, but were protested for non-payment, and then rested.

The defendant thereupon testified that some time prior to executing the notes sued upon, he had a talk with Turner, the payee of the notes, in Chicago,

411 A. 624

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

THE CHICAGO NATIONAL BANK OF
CHICAGO, ILLINOIS, PLAINTIFF,

vs.

ALVIN K. BROWN, DEFENDANT.

APPEALANT.

Opinion filed May 2, 1936.

MR. PRESIDING JUSTICE THOMSON delivered the

opinion of the court.

By this appeal the defendant seeks to reverse a judgment for \$250.00, recovered by the plaintiff bank in the Municipal Court of Chicago, on two promissory notes, in which were the maker and one Turner the payee, the latter having endorsed the notes in blank. At the close of all the evidence the court instructed the jury to find the issues for the plaintiff. In support of his appeal the defendant contends that the evidence was such as to require that the issues be submitted to the jury, and that the trial court therefore erred in directing a verdict. The bank introduced the notes, together with proof that they were not paid as maturity, but were protested for non-payment, and then

The defendant thereupon testified that some time prior to execution of the notes would want to pay a bill of \$250.00, the maker of the notes, as witness,

who told him that he had just come up to Chicago from Bowling Green, Kentucky, where he had an option on some oil rights in certain lands in Kentucky, in which he would like to interest the defendant; that at Turner's invitation he went down to Bowling Green to look the situation over and there he met one Beard, who was the cashier of the plaintiff bank; that he accompanied Beard and Turner and several others to the property which Beard said he owned, and he testified that Beard further told him that there was oil and shale on the property and that he was desirous of selling the mineral rights for \$20,000, which money, he said, when received, he proposed to use in drilling wells, and that if he got oil he would pay the purchasers of the mineral rights a one-eighth royalty on all that was secured. The defendant further testified that Beard told him that Turner was going to do the drilling and that he had given Turner a deed for the mineral rights in the property, which was in escrow in the bank, and that the deed had been given to Turner so that he might dispose of the mineral rights conveyed by it; that Beard explained that he did not have the money necessary to drill unless he sold the mineral rights, and as soon as he did get the money for those rights, he was going to proceed with the drilling; that he was going to use the \$20,000 he expected to get for the mineral rights, to drill the land. At that time the defendant purchased a part interest in the mineral rights on this property for \$2,500, giving Beard his check for that amount and receiving a deed signed by Turner and his wife, conveying to the defendant a "one-eighth interest in and to the oil, gas and mineral rights" on the property in question. This deed was silent

who told him that he had just come up to Chicago from Bowling Green, Kentucky, where he had an option on some oil rights in certain lands in Kentucky, in which he would like to interest the defendant; that at Turner's invitation he went down to Bowling Green to look the site over and there he met one Heard, who was the manager of the plaintiff bank; that he accompanied Heard and Turner and several others to the property which Heard said he owned, and he testified that Heard further told him that there was oil and shale on the property and that he was desirous of selling the mineral rights for \$20,000, which money, he said, when received, he proposed to use in drilling wells, and that if he got oil he would pay the purchasers of the mineral rights a one-eighth royalty on all that was recovered. The defendant further testified that Heard told him that Turner was going to do the drilling and that he had given Turner a deed for the mineral rights in the property, which was in record in the bank, and that the deed had been given to Turner so that he might dispose of the mineral rights conveyed by it; that Heard explained that he did not have the money necessary to drill unless he sold the mineral rights, and as soon as he did get the money for those rights, he was going to proceed with the drilling; that he was going to use the \$20,000 he expected to get for the mineral rights, to drill the land. At that time the defendant purchased a part interest in the mineral rights on this property for \$2,500. Giving Heard his check for that amount and receiving a deed signed by Turner and his wife, conveying to the defendant a one-eighth interest in and to the oil, gas and mineral rights on the property in question. This deed was signed

on the subject of drilling the property. The defendant then testified that he returned to Chicago, and that a few weeks later Turner again came up to Chicago and stated that they had not made a complete sale of the mineral rights on this property, but that they still had a one-sixteenth interest to dispose of, and he wanted to know if the defendant would take it, "and after some argument he prevailed upon me to take \$1,250 more." The defendant did not have the cash to pay this last interest he purchased in the mineral rights on this property, but Turner accepted his note for \$1,250, in payment of that interest. When the defendant gave Turner that note he received another deed similar to the former one, conveying a one sixteenth interest to the oil, gas and mineral rights on the property. This deed likewise made no reference to drilling the property. When this deed was identified and offered in evidence the defendant was asked, "And that's what you received for the \$1,250 note?" and he answered that it was. He testified that on the occasion of this second visit of Turner, when he made his last purchase, Turner told him that when they succeeded in selling this final one-sixteenth interest in the oil and mineral rights on the property, they were going to start drilling.

At the maturity of this \$1,250 note the defendant paid \$400 on it and gave two notes, one for \$400 and the other for \$450, both drawn to the order of Turner. These are the notes now sued upon by the bank. The defendant testified that after giving these last notes he had another conversation with Turner, here in Chicago, who apparently

on the subject of drilling the property. The defendant then testified that he returned to Chicago, and that a few weeks later Turner again came up to Chicago and stated that they had not made a complete sale of the mineral rights on this property, but that they still had a one-sixteenth interest in disposing of, and he wanted to know if the defendant would take it, "and after some argument he prevailed upon me to take \$1,250 more." The defendant did not have the cash to pay this last interest he purchased in the mineral rights on this property, but Turner accepted his note for \$1,250, in payment of that interest. When the defendant gave Turner this note he received another cash advance to the former one, conveying a one sixteenth interest to the oil, gas and mineral rights on the property. This cash likewise made no reference to drilling the property. When this cash was the title and offered in evidence the defendant was asked, "And that's what you received for the \$1,250 note?" and he answered that it was. He testified that on the occasion of this second visit of Turner, when he made his last purchase, Turner told him that when they succeeded in selling this final one-sixteenth interest in the oil and mineral rights on the property, they were going to start drilling.

At the maturity of this \$1,250 note the defendant paid \$400 on it and gave two notes, one for \$400 and the other for \$450, both drawn to the order of Turner. These are the notes now sued upon by the bank. The defendant testified that after giving these last notes he had another conversation with Turner, here in Chicago, who apparently

came up here with the notes endeavoring to collect them. In the meantime the defendant had made some investigation and found that no drilling operations had been undertaken on this property and consequently he refused to pay the notes sued upon, giving that as the reason. He testified that on this occasion he offered to return the deeds to Turner but Turner declined to take them.

On cross-examination, the defendant testified that when his \$1,250 note fell due he wrote Beard about it and stated that he only wanted to pay \$400 on the note at that time and that Beard replied that that arrangement was satisfactory. This was in February 1923. The defendant admitted that in June, following, he wrote another letter to Beard stating that he expected to be in Bowling Green shortly and would appreciate it if Beard would hold the two notes now in suit until his arrival, or if agreeable renew them. In this letter he explained that the reason he had not written sooner in regard to taking up these notes was that he had been very busy. The defendant was asked when Beard stated they were going to do the drilling on this property, and he answered, "as soon as he could get the money."

In our opinion the trial court did not err in directing a verdict for the plaintiff. In support of his appeal the defendant contends that on the testimony in the record the burden was on the plaintiff to show that it was a holder of these notes in due course, and that it failed to meet that burden as it introduced no evidence on that subject, and that on all the evidence in the record the most that can

... of the notes underlying the ...
... the ... the ...
... and found that no drilling operations had been
... on this property and consequently he refused
... the notes were again, giving them as the reason.
... that on this occasion he offered to return
... to ... but ... declined to take them.

On cross-examination, the defendant testified
that when his \$1,500 note fell due he wrote Beard about
it and stated that he only wanted to pay \$400 on the note
at that time and that Beard replied that that arrangement
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and admitted that in June, following, he wrote another
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these notes was that he had been very busy. The defendant
and was asked when Beard stated they were going to do the
drilling on this property, and he answered, "as soon as he
could get the money."

In our opinion the trial court did not err in
directing a verdict for the plaintiff. In support of his
opinion the defendant contends that on the testimony in the
record the burden was on the plaintiff to show that it was
a matter of these notes in due course, and that it failed to
meet that burden as it introduced evidence on that subject,
and that on all the evidence in the record the most that can

be said is that the case should have gone to the jury on that issue. In our opinion the question of whether the bank was a holder in due course is immaterial. Even if it were not, the result would only be that the notes in the hands of the bank would be subject to such defenses as the defendant might have to them as against the payee, Turner. In our opinion the defendant's evidence discloses a situation indicating clearly that the consideration for these notes had not wholly failed as alleged by the defendant in his affidavit of merits. The consideration for these notes was the deed the defendant received for a one-sixteenth interest in the oil rights on the land in question. That deed he received when he gave his original note for \$1,250, in part payment of which the two notes now in suit were given. The grantor in that deed entered into no undertaking about drilling the land and it is entirely clear, in our opinion, from the defendant's own testimony, that the question of drilling did not enter into the consideration for the \$1,250 note. The most that can be said on this question is that statements were made to the defendant to the effect that when the parties interested in the land received the \$20,000 they were asking for the oil rights on the land, they were going to use the money in drilling. Even if we assume that the parties have received the \$20,000, it cannot be said that the question of drilling entered into the consideration for the defendant's notes. It may be assumed that when the defendant bought his one-eighth and one-sixteenth interests on the mineral rights of the land, he expected the parties to drill, but if he wanted them to make an agreement with him they would drill, and wanted to

he said in that the same should have been to the jury on that issue. In my opinion the question whether the bank was a holder in due course is immaterial. Even if it were not, the result would only be that the notes in the hands of the bank would be subject to such defenses as the defendant might have to them as against the payee. In my opinion the defendant's evidence discloses a situation indicating clearly that the consideration for these notes had not wholly failed as alleged by the defense and in the absence of contrary evidence. The consideration for these notes was the deed the defendant received for a one-sixteenth interest in the oil rights on the land in question. That deed he received when he gave his original note for \$1,250, in part payment of which the two notes now in suit were given. The grantor in that deed entered into no undertaking about drilling the land and it is entirely clear, in my opinion, from the defendant's own testimony, that the question of drilling did not enter into the consideration for the \$1,250 note. The note that can be said on this question is that statements were made to the defendant to the effect that when the parties interested in the land received the \$50,000 they were acting for the oil rights on the land, they were going to use the money in drilling. Even if we assume that the parties have received the \$50,000, it cannot be said that the question of drilling entered into the consideration for the defendant's notes. It may be assumed that when the defendant bought his one-sixteenth and one-sixteenth interests in the mineral rights of the land, he expected the parties to drill, but if he wanted them to make an agreement with him they would drill, and wanted to

pay his \$2,500 and give his \$1,250 note as a consideration for that promise, together with the deeds for his interests, he should have made his deal with the parties in interest on that basis. This, however, he did not do. The consideration for the defendant's payments was the deeds he received and those contain neither a representation nor an agreement on the question of drilling. Even on the theory that there was an agreement to drill the land, made by Beard and Turner, which entered into the consideration for these notes, the most that could be said is that the consideration had partially failed, which the defendant has not pleaded nor, on such theory, has the defendant shown the extent of such failure.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

pay him \$5,000 and give him \$1,000 more as a consideration
for that promise, together with the deeds for his interest,
he should have made his deal with the parties in interest
on that basis. This, however, he did not do. The consideration
for the defendant's payments was the deeds he received
and these contain neither a representation nor an agreement
on the question of drilling. Even on the theory that there
was an agreement to drill the land, made by Lewis and Turner,
which entered into the consideration for these notes, the mere
fact could be said is that the consideration had partially
failed, which the defendant has not pleaded nor, on such
theory, has the defendant shown the extent of such failure.

For the reasons stated the judgment of the Honorable
Court is affirmed.

DOCUMENT ATTACHED.

TAYLOR AND O'CONNOR, 11. TORONTO.

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel JOHN WALSH,

Appellee,

v.

WILLIAM E. DEVER, ET AL,

Appellants.)

241 T A 625

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the
opinion of the court.

By this appeal the respondents, William E. Dever, et al, seek to reverse a judgment of the Superior Court of Cook County, ordering that a writ of mandamus issue in favor of the petitioner Walsh, directing the respondents to approve the application of said petitioner for a billiard room license, and that they issue said license pursuant to the application which the petitioner had filed with the city authorities. By his petition the petitioner alleged that he was a resident and citizen of the City of Chicago and a person of good moral character; that he was the owner of a leasehold, with more than two years to run, of the premises known as 1143 W. 79th street, Chicago. The petitioner then set up in his petition the ordinance of the City of Chicago, relating to the issuances of licenses to conduct billiard rooms in said city, which ordinance contains no restrictions as to the location of such billiard rooms. This ordinance creates what is known as a billiard commission of the City of Chicago, and it provides that one desiring to operate a billiard room shall file an application

241 A. 255

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

THE PEOPLE OF THE STATE OF ILLINOIS, on the one part,

Appellee,

vs.

WILLIAM E. HEVER, et al.,

Appellants.

Opinion filed May 5, 1936.

MR. PRESIDING JUSTICE THOMSON delivered the

opinion of the court.

On appeal from the respondents, William E. Hever, et al., seek to reverse a judgment of the Superior Court of Cook County, ordering that a writ of mandamus issue in favor of the petitioner Walsh, directing the respondents to approve the application of said petitioner for a billiard room license, and that they issue said license pursuant to the application when the petitioner had filed with the city authorities. By his petition the petitioner alleged that he was a resident and citizen of the City of Chicago and a person of good moral character; that he was the owner of a household, with more than two years to run, of the premises known as 1125 W. 79th Street, Chicago. The petitioner then set up in his petition the ordinances of the City of Chicago, relating to the issuance of licenses to conduct billiard rooms in said city, which ordinance contains no restrictions as to the location of such billiard rooms. This ordinance created what is known as a billiard commission of the City of Chicago, and it provided that one desiring to operate a billiard room should file an application

for a license with the commission which application shall give certain information called for by the ordinance, and when such application is made the billiard commission shall make an investigation as to the character of the applicant and shall report ^{the results} of their investigation to the superintendent of police. The ordinance further provides that if, upon such investigation, the commission shall find that the applicant is not a person of good moral character or has previously been connected with any billiard room where the license has been revoked and not been restored, or where any provisions of the ordinance with reference to billiard rooms, have been violated, or that the billiard room sought to be licensed does not comply in every way with the regulations, ordinances and laws, applicable thereto, the commission shall make a report to that effect to the superintendent of police. And further, that if upon such investigation the applicant is found to be qualified in accordance with the provisions of the ordinance, and the rules and regulations established thereunder, the commission shall so report to the superintendent of police, and that the superintendent of police may, in his discretion, grant the license to the applicant.

The petitioner then set forth in his petition that he had made an application in writing, for a license to conduct a billiard room in the storeroom known as 1143 West 79th street, in the City of Chicago, such application being upon a blank provided for that purpose by the secretary of the billiard commission of the City of Chicago, and that he had filed that application with the secretary of the commission; that on March 16, 1925, the petitioner received a communication

for a license with the commission which application shall
give certain information called for by the ordinance, and
when such application is made the billiard commission shall
make an investigation as to the character of the applicant
and shall report ^{the results} of their investigation to the superintendent
of police. The ordinance further provides that if,
upon such investigation, the commission shall find that
the applicant is not a person of good moral character or
has previously been connected with any billiard room where
the license has been revoked and not been restored, or where
any provisions of the ordinance with reference to billiard
rooms, have been violated, or that the billiard room sought
to be licensed does not comply in every way with the regu-
lations, ordinances and laws, applicable thereto, the com-
mission shall make a report to that effect to the superintendent
of police, and further, that if upon such investigation the
applicant is found to be qualified in accordance with the pro-
visions of the ordinance, and the rules and regulations
established thereunder, the commission shall so report to
the superintendent of police, and that the superintendent of
police may, in his discretion, grant the license to the appli-
cant.

The petitioner then set forth in his petition that
he had made an application in writing, for a license to con-
duct a billiard room in the storehouse known as 1143 West 73rd
street, in the City of Chicago, such application being upon
a blank provided for that purpose by the secretary of the
billiard commission of the City of Chicago, and that he had
filed that application with the secretary of the commission
that on March 16, 1922, the petitioner received a communication

from the secretary, advising him that his application for a license had been refused because a protest had been made against it; and further, that the license would not be issued until the approval of the police department had been secured; that the petitioner then applied to the police department for advice as to the reason for withholding approval of his application and was advised that a protest had been made to the captain of the district in which the proposed location of the billiard room was; that the ordinance provides that all applications for such licenses shall be referred by the secretary of the commission to the captain of police in the district in which the applicant resides, for investigation and that the latter shall endorse his recommendation thereon and forward it to the superintendent of police, and that if the investigation has proven satisfactory the latter shall endorse his recommendation thereon and forward it to the secretary of the commission; that in pursuance of the foregoing requirements, the secretary of the commission forwarded the petitioner's application to the captain of police and that the latter endorsed the following report thereon: "Investigation has been made and I find applicant for billiard room license (Class A) to be a man of good reputation and character, but owing to the fact that a citizen has protested a billiard room in this location I recommend that no license be granted," and that such application with that report of the captain of police was returned to the secretary of the commission by the superintendent of police; the latter apparently adopting the recommendation of the captain of police. The petitioner further alleged in his petition that he had complied with all the requirements of the ordinances regulating billiard

from the secretary, advising him that his application for a license had been refused because a protest had been made against it; and further, that the license would not be issued until the approval of the police department had been secured; that the petitioner then applied to the police department for advice as to the reason for withholding approval of his application and was advised that a protest had been made to the captain of the district in which the proposed location of the billiard room was; that the ordinance provides that all applications for such licenses shall be referred by the secretary of the commission to the captain of police in the district in which the applicant resides, for investigation and that the latter shall endorse his recommendation thereon and forward it to the superintendent of police, and that if the investigation has proven satisfactory the latter shall endorse his recommendation thereon and forward it to the secretary of the commission; that in pursuance of the foregoing requirements the secretary of the commission forwarded the petitioner's application to the captain of police and that the latter endorsed the following report thereon: "Investigation has been made and I find applicant for billiard room license (Class A) to be a man of good reputation and character, but owing to the fact that a citizen has protested a billiard room in this location I recommend that no license be granted." and that such application with that report of the captain of police was returned to the secretary of the commission by the superintendent of police; the latter apparently adopting the recommendation of the captain of police. The petitioner further alleged in his petition that he had complied with all the requirements of the ordinance regulating billiard

rooms and applications for licenses in connection therewith, and that the action of the mayor, in refusing to issue a license to him was arbitrary, wrongful and without legal excuse. These latter allegations were, of course, the conclusions of the petitioner. The respondents interposed a demurrer to the petition, which demurrer was overruled, and the respondents electing to stand by said demurrer, the court entered judgment ordering that a writ of mandamus issue in accordance with the prayer of the petitioner.

In our opinion the court did not err in overruling the demurrer. The only question here presented is whether it is an abuse of the discretion lodged with the mayor of the city to refuse to issue a license for a billiard room to an applicant of good moral character and reputation, solely for the reason that some citizen objects to the location of the billiard room at the place designated in the application. In our opinion, that question must be answered in the affirmative. It is of course true as the respondents contend, that the petitioner must show a clear right to the writ, before the court will award it, and that ordinarily the writ of mandamus will not be issued directing public officials to act in a certain way in a matter in which the law has reposed certain discretion in those officials, although such a writ may issue directing them to take some action, one way or the other. But, it is also true that such officials may not exercise their discretion in an arbitrary or capricious way. It would seem that where a man of good reputation and character makes application for a license to operate a billiard room, it must be held that city officials have exercised the discretion reposed in them, arbitrarily, where it is admitted that

rooms and applications for licenses in connection therewith, and that the action of the mayor, in refusing to issue a license to him was arbitrary, wrongful and without legal ground. These latter allegations were, of course, the substance of the petition. The respondents interposed a demurrer to the petition, which demurrer was overruled, and the respondents electing to stand by said demurrer, the court entered judgment ordering that a writ of mandamus issue in accordance with the prayer of the petitioner.

In our opinion the court did not err in overruling the demurrer. The only question here presented is whether it is an abuse of the discretion lodged with the mayor of the city to refuse to issue a license for a billiard room to an applicant of good moral character and reputation, solely for the reason that some other objects to the location of the billiard room at the place designated in the application. In our opinion, that question must be answered in the affirmative. It is of course true as the respondents contend, that the petitioner must show a clear right to the writ, before the court will award it, and that ordinarily the writ of mandamus will not be issued directing public officials to act in a certain way in a matter in which the law has imposed certain discretion in those officials, although such a writ may issue directing them to take some action one way or the other. But it is also true that such officials may not exercise their discretion in an arbitrary or capricious way. It would seem that where a man of good reputation and character makes application for a license to operate a billiard room, it must be held that city officials have exercised the discretion reposed in them, arbitrarily, where it is shown that

they have denied the application and refused a license only for the reason that someone else has objected to it and lodged a protest with the officials, nothing appearing as to the reason for such objection and protest. Counsel for the respondents contend broadly that it is not an abuse of discretion to refuse a license for a billiard room. It may not be under some circumstances, and it may be, under others. The cases referred to in support of their broad proposition do not support it. In Swift v. The People, 63 Ill. App. 453, an application was made for a license to operate a saloon at 3300 Wabash avenue, Chicago. At the time this application was made there were apparently no restrictions as to the location of saloons. The mayor of the city denied the application. In that case the respondents did not demurr to the petition but they filed an answer in which they set forth that for some distance in either direction from 3300 Wabash avenue, and on both sides of the street, there were nothing but private residences, all of which consisted of expensive and costly buildings, and that the property within that area was worth from \$300 to \$400 per front foot, and that the location of a saloon at the point designated would greatly depreciate the value of this property for residence purposes, and decrease the attractiveness of the neighborhood for such purposes. In that case the petitioner demurred to the answer of the respondents and the demurrer was sustained and judgment entered, ordering that the writ issue. On appeal to this court the judgment was reversed. In Harrison v. The People, 101 Ill. App. 224, a petition had been filed requesting a license to operate a bowling alley. In this case also the respondents filed an answer setting up that the proposed location of this bowling

they have denied the application and returned a license only for the reason that someone else has objected to it and joined a protest with the officials, nothing appearing as to the reason for such objection and protest. Counsel for the respondents contend broadly that it is not an abuse of discretion to refuse a license for a billiard room. It may not be under some circumstances, and it may be, under others. The cases referred to in support of their broad proposition do not support it. In Exile v. The People, 63 Ill. App. 485, an application was made for a license to operate a saloon at 2800 Webster Avenue, Chicago. At the time this application was made there were apparently no other saloons on the location of saloons. The mayor of the city denied the application. In that case the respondents did not demur to the petition but they filed an answer in which they set forth that for some distance in either direction from 2800 Webster Avenue, and on both sides of the street, there were nothing but private residences, all of which consisted of expensive and costly buildings, and that the property within that area was worth from \$200 to \$400 per front foot, and that the location of a saloon at the point designated would greatly depreciate the value of this property for residential purposes, and because the respondents were of distinguished for such purposes. In that case the petitioners demurred to the answer of the respondents and the answer was sustained and judgment entered, ordering that the writ issue. On appeal in this court the judgment was reversed. In Warrick v. The People, 101 Ill. App. 204, a petition had been filed requesting a license to operate a billiard alley. In this case also the respondents filed an answer setting up that the proposed location of this building

alley was in close proximity to a church and a school and an academy for children and young ladies and a college for young men, and also in a neighborhood which was mainly, although not entirely, residence, and further, that it was proposed to operate it in conjunction with a saloon, and when considered as a part of the saloon property, would bring such property within a distance of the church and school which was prohibited by the ordinances. In this case also the petitioner demurred to the answer of the respondents and the court sustained the demurrer and ordered a writ of mandamus to issue. On an appeal to this court the judgment awarding the writ was reversed. In Harris v. The People, 222 Ill. 150, which involved an application for a license to operate a dram shop, the respondents answered and there was a hearing on the petition and answer.

No such situation as was involved in the foregoing cases is presented here. In our opinion, the petitioner shows a clear right to the writ, where he sets up that he is a man of good moral character and has been found to be such by the city authorities themselves, and that he has complied with all the requirements of the ordinances, with regard to making an application to maintain a billiard room, and that such application has been rejected only because someone has filed an objection with the respondents and a protest against the issuance of the license. If that objection and protest was based on some proper and reasonable ground, we are of the opinion that it was incumbent upon the respondents to set it forth by answer.

For the foregoing reasons the judgment of the Superior Court is affirmed.

TAYLOR AND O'CONNOR, JJ. CONCUR.

JUDGMENT AFFIRMED.

ally was in close proximity to a church and a school and
 an assembly for children and young ladies and a college for
 young men, and also in a neighborhood which was mainly
 although not entirely, residential, and further, that it
 was proposed to operate it in conjunction with a school,
 and when considered as a part of the school property, would
 bring such property within a distance of the church and
 school which was prohibited by the ordinance. In this
 case also the petitioners demurred to the answer of the res-
 pondents and the court sustained the demurrer and ordered
 a writ of mandamus to issue. On an appeal to this court
 the judgment awarding the writ was reversed. In Harris v.
The People, 222 Ill. 120, which involved an application for
 a license to operate a dance shop, the respondents answered
 and there was a hearing on the petition and answer.

No such question as was involved in the fore-
 going cases is presented here. In our opinion, the peti-
 tioners show a clear right to the writ, where he sets up
 that he is a man of good moral character and has been found
 to be such by the city authorities themselves, and that he
 has complied with all the requirements of the ordinance, with
 regard to making an application to maintain a billiard room,
 and that such application has been rejected only because some-
 one has filed an objection with the respondents and a protest
 against the issuance of the license. If that objection and
 protest was based on some proper and reasonable ground, we are
 of the opinion that it was incumbent upon the respondents to
 set it forth by answer.

For the foregoing reasons the judgment of the
 Superior Court is affirmed.
 TAYLOR AND O'CONNOR, JJ. CONCUR.

CHARLES LUNDMARK,

Appellee,

v.

CHARLES FISCHER,

Appellant.

241 625
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 5, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Fischer seeks to reverse a judgment for \$164.85, recovered against him by the plaintiff in the Municipal Court of Chicago. In the original statement of claim the plaintiff alleged that there was due him from the defendant, as wages, the sum of \$287.85. Later, the plaintiff filed an amended statement of claim to the effect that the balance due him was \$267.35. It was admitted that the plaintiff had been employed by the defendant as a laborer, the agreement being that the defendant should pay him fifty cents an hour, but there was a conflict between the parties as to the length of time the plaintiff worked and also as to the amounts which had been paid him from time to time.

The defendant and a nephew of his were running a hotel on West Madison street in the City of Chicago, and the plaintiff was employed by the defendant to do certain work about that hotel. In the course of his testimony the plaintiff stated that he began to

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341 I.A. 625
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

APPELLEE
APPELLANT
COURT REPORTER
APPEAL FROM

Opinion filed May 2, 1936.

MR. THOMAS J. THOMAS delivered the
opinion of the court.

By this appeal the defendant Thomas seeks to
reverse a judgment for \$164.88, rendered against him
by the plaintiff in the Municipal Court of Chicago. In
the original statement of claim the plaintiff alleged
that there was due him from the defendant, as wages, the
sum of \$237.25. Later, the plaintiff filed an amended
statement of claim to the effect that the wages due
him was \$237.25. It was admitted that the plaintiff had
been employed by the defendant as a laborer, the defendant
being that one - [illegible] should pay him fifty cents an
hour, but there was a conflict between the parties as to
the length of time the plaintiff worked and also as to
the amount which had been paid him from time to time.
The defendant and a nephew of his were
running a hotel on West Madison street in the City of
Chicago, and the plaintiff was employed by the defendant
and in the course of his work at that hotel. In the course
of his testimony the plaintiff stated that he began to

work at the defendant's hotel on the second of September and worked there every day until Christmas, and after Christmas he also worked there a number of days, and until January 5th or 6th. He testified further that he kept account of the number of hours he had put in and the amounts that were paid him, in a little book, the entries in which he made every evening. When he attempted to refer to this book in the course of his testimony, objection was made and sustained, on the ground that the plaintiff had not exhausted his independent recollection. He then proceeded to testify, apparently from his independent recollection, to the number of days he had worked in each month and the hours, saying that he worked 10 hours a day for 26 days in September; 31 days in October, putting in at least 12 hours a day; 30 days in November, 12 hours a day; 30 days in December, 12 hours each day; and 3 days in January, 8 hours a day. He was unable to state which days he worked in January and he was then permitted to refer to his book. He testified that he drew a dollar or two each day and made a memorandum in his book every night as to the amount paid him that day. For most of the time he was working there the plaintiff lived at the defendant's hotel, and was charged \$7.50 a week as room rent, this amount being charged against his wages. The room rent for the entire period totalled the sum of \$63.00. On his cross-examination he had occasion to refer to his book in order to answer the questions and on redirect examination this book was again offered in evidence. After some discussion the court received it in evidence. Defendant contends that the trial court erred in that ruling.

work at the defendant's hotel on the second of September and worked there every day until Christmas, and after Christmas he also worked there a number of days, and until January 2nd or 3rd. He testified further that he kept account of the number of hours he had put in and the amounts that were paid him in a little book, and the times in which he made every evening. When he attempted to refer to this book in the course of his testimony, objection was made and sustained, on the ground that the plaintiff had not introduced his independent recollection. He then proceeded to testify, apparently from his independent recollection, to the number of days he had worked in each month and the hours, saying that he worked 10 hours a day for 26 days in September; 31 days in October; putting in at least 12 hours a day; 30 days in November; 12 hours a day; 30 days in December; 12 hours each day; and 3 days in January, 8 hours a day. He was unable to state which days he worked in January and he was then permitted to refer to his book. He testified that he drew a dollar or two each day and made a memorandum in his book every night as to the amount paid him that day. For most of the time he was working there the plaintiff lived at the defendant's hotel, and was charged \$1.50 a week as room rent, this amount being charged against his wages. The room rent for the entire period totaled the sum of \$22.50. On his cross-examination he had occasion to refer to his book in order to answer the questions and on redirect examination this book was again offered in evidence. After some discussion the court decided it in evidence. Defense and contends that the trial court erred in that ruling.

In our opinion the book was clearly admissible either as a book of account, the entries in which had been made by the plaintiff himself in the ordinary course of business, Chisbela v. Messen Machine Co., 160 Ill. 101, 111, or as a memorandum of the past recollection of the witness. Koch v. Pearson, 218 Ill. App. 468; Drexel Storage & Transfer Co. v. Hotel LaSalle Co., 232 Ill. App. 643.

For the defendant, his nephew Reuben Fischer testified to the effect that the plaintiff worked at the defendant's hotel beginning the first week in September, and that he kept a record in a book of the time the plaintiff put in on his work and of all the payments made him. This witness testified that on every Saturday night he figured up the total number of hours which the plaintiff had worked during that week, the amount which was due him for that work at 50 cents an hour; the total payments made to him during the week, the sum of which, together with the room rent for that week, was deducted from the total amount the plaintiff had earned during that week, and whatever the balance was shown to be was then paid to the plaintiff so that his account was balanced at the end of every week. This was contrary to the testimony of the plaintiff on this point, which was that in compliance with the suggestion of the defendant made at the beginning of his employment, he drew only such amounts from day to day as he actually needed, leaving the balance with the defendant, to his credit, so that he would have a substantial amount coming to him at the end of his employment. The book kept by the witness,

IN my opinion the book was clearly attributable either
as a book of account, the entries in which had been
made by the plaintiff himself in the ordinary course
of business, Alphons v. Bernard & Co., 100 Ill.
101, 111, or as a memorandum of the want of collection
of the witness, Edw. T. Forster, 113 Ill. App. 488;
Smith v. ... v. Hotel ... Co.,

SEE Ill. App. 488.

For the defendant, his nephew Nathan Fisher
testified to the effect that the plaintiff worked at
the defendant's hotel beginning the first week in Sep-
tember, and that he kept a record in a book of the time
the plaintiff put in on his work and of all the payments
made him. This witness testified that on every Saturday
night he lit up the total number of hours which the
plaintiff had worked during that week, the amount which
was due him for that week at 50 cents an hour; the total
payments made to him during the week, the sum of which,
together with the room rent for that week, was deducted
from the total amount the plaintiff had earned during
that week, and whatever the balance was shown to be was
then paid to the plaintiff so that his account was bal-
anced at the end of every week. This was contrary to the
testimony of the plaintiff on this point, which was that
in compliance with the suggestion of the defendant made
at the beginning of his employment, he drew only cash
amounts from day to day as he actually needed, leaving
the balance with the defendant in his pocket, so that
he would have a statement amount coming to him at the
end of his employment. The book kept by the witness.

Reuben Fischer, was referred to by him from time to time in the course of his testimony, and it was also admitted in evidence. A comparison which the court made between the books kept by the respective parties showed numerous differences, both as to hours of work and amounts paid. According to that record there was due the plaintiff at the end of his employment a balance of \$8.00. The defendant himself testified that the plaintiff was paid every Saturday the balance then shown to be due him after deducting the room rent and the amounts paid him from time to time, during the week.

In rebuttal, the plaintiff called one Blake, who had been employed by the defendant as a janitor at his hotel during the time the plaintiff was working there. The defendant had denied that the plaintiff did any work about the hotel after Christmas, or that he had ever done such work as shoveling coal. Blake testified that he did do some work after Christmas and that he was "down in the basement shoveling coal, firing up and things like that." He further testified (without objection) that he occupied a room next to the one occupied by the plaintiff and that he was frequently in the plaintiff's room during the evening and on one occasion when the plaintiff was making some entries in his book he asked him what he was doing and he said he was "keeping the time;" that the witness then asked him if he did not draw his money every week and he said that he did not but that "he was keeping his money until he got a big sack. He told me that he had the amount in his book, that he drew every night, and checked it, and at the end of the month he would check it up and tell me how

Harbor Trencher, was referred to by him from time to time in the course of his testimony, and it was also admitted in evidence. A comparison of the cards made between the books kept by the respective parties showed numerous differences, both as to hours of work and amounts paid. According to what is said there was due the plaintiff at the end of his employment a balance of \$8.00. The defendant himself testified that the plaintiff was paid every Saturday the balance then shown to be due him after deducting the room rent and the amounts paid him from time to time, during the week.

In rebuttal, the plaintiff called one Blake, who had been employed by the defendant as a janitor at his hotel during the time the plaintiff was working there. The defendant had denied that the plaintiff did any work about the hotel after Christmas, or that he had ever done such work as shoveling coal. Blake testified that he did it some work after Christmas and that he was "down in the basement shoveling coal, fitting up and things like that." He further testified (without objection) that he recognized a card sent to him and received by the plaintiff and that he was frequently in the plaintiff's room during the winter and in the summer when the plaintiff was working there. In his book he asked him what he was doing and he said he was "keeping the time." That the witness then asked him if he did not draw his money every week and he said that he did not but that "he was keeping his money until he got a big week. He told me that he had the amount in his coat, that he drew every night, and checked it, and at the end of the month he would check it up and tell me how

much he had coming."

The court, having tried the issues without the intervention of a jury, at the close of all the evidence, found the issues for the plaintiff and entered judgment in his favor for \$164.85. In support of his appeal from that judgment the defendant contends that the trial court erred in admitting the plaintiff's book in evidence; that the judgment is against the manifest weight of the evidence and that in any event, there is no evidence in the record to support the judgment which the court entered, awarding the plaintiff \$164.85. We have stated above that in our opinion the trial court did not err in admitting not only the plaintiff's book but also the defendant's in evidence. On the evidence in this record we are further of the opinion that we could not say that the court's finding for the plaintiff is against the manifest weight of the evidence. The main conflict between the witnesses had to do with the amounts which had been paid the plaintiff and this involved the farther question of whether the plaintiff was paid the entire balance due him from week to week on each Saturday. The plaintiff was corroborated as to his theory on the latter point, by the witness Blake, whereas the defendant and his nephew testified to the contrary. As to the amounts paid to the plaintiff from time to time, we have the testimony of the plaintiff on one side and that of Heuben Fischer on the other. With this conflicting evidence in the record we are bound to recognize the fact that much depended upon the appearance of the witnesses on the witness stand, and those other elements of which the trial court was

much he had coming.

The court, having tried the issues without the intervention of a jury, at the close of all the evidence, found the issues for the plaintiff and entered judgment in his favor for \$104.85. In support of his appeal from that judgment the defendant contends that the trial court erred in admitting the plaintiff's book in evidence; that the judgment is against the weight of the evidence and that in any event, there is no evidence in the record to support the judgment which the court entered, awarding the plaintiff \$104.85. We have stated above that in our opinion the trial court did not err in admitting not only the plaintiff's book but also the defendant's in evidence. On the evidence in this record we are further of the opinion that we could not say that the court's finding for the plaintiff is against the weight of the evidence. The main conflict between the witnesses had to do with the amount which had been paid the plaintiff and this involved the further question of whether the plaintiff was paid the entire balance due him from time to time or not. The plaintiff was represented as to this matter by the latter point, by the witness Blake, whereas the defendant and his nephew testified to the contrary. As to the amounts paid to the plaintiff from time to time, we have the testimony of the plaintiff on one side and that of Nathan Blake on the other. With this conflicting evidence in the record we are bound to recognize the fact that much depended upon the appearance of the witnesses on the witness stand, and these other elements of which the trial court was

in a position to avail himself, but of which a court of review is deprived. If the trial court was inclined to believe the plaintiff and his witness rather than the defendant and his nephew, we are not in a position to say that such a course was not warranted. As far as the testimony is concerned, as it appears in the typewritten pages of the record, it is in hopeless conflict. We cannot say that the finding of the issues for the plaintiff was against the manifest weight of the evidence.

As to the last point urged by the defendant, we would say that if the trial court believed the plaintiff, as he apparently did, then we are of the opinion that the evidence would have justified a finding and judgment in the plaintiff's favor for at least the amount declared upon by him in his amended statement of claim, which was somewhat larger than the amount of the judgment. According to the testimony given by the plaintiff, independently of his memorandum, there would be due him a balance of \$390.10. When we come to examine his memorandum, however, it is apparent that on a number of days the plaintiff did not put in the full time of 10 hours a day or 12 hours a day. If his daily memorandum is to be taken as a basis, there would be a balance due him of \$283.10. If his statement of claim were such as to support that amount, we would be inclined to say that he should have had a judgment for that. But, as he had declared in his amended statement of claim on the basis of \$267.35, he could not be given a judgment for a greater amount, unless his statement of claim was properly amended, and he submitted no motion to that effect. Inasmuch as we believe that a finding for the plaintiff

in a position to avail himself, but of which a court of review is deprived. If the trial court was inclined to believe the plaintiff and his witness rather than the defendant and his nephew, we are not in a position to say that such a course was not warranted. As far as the testimony is concerned, as it appears in the specification pages of the record, it is in hopeless conflict. We cannot say that the timing of the witness for the plaintiff will weigh against the manifest weight of the evidence.

As to the last point urged by the defendant, we would say that if the trial court believed the plaintiff, as he apparently did, then we are of the opinion that the evidence would have justified a finding and judgment in

the plaintiff's favor for at least the amount declared upon by him in his amended statement of claim, which was somewhat larger than the amount of the judgment. According to the testimony given by the plaintiff, independently

of his memorandum, there would be due him a balance of \$380.10. When we come to examine his memorandum, however, it is apparent that on a number of days the plaintiff did not put in the full time of 10 hours a day or 12 hours a day. It is his daily memorandum in so far as a house, there

would be a balance due him of \$385.10. If his statement of claim were such as to support that amount, we would be inclined to say that he should have had a judgment for that. But, as he had declared in his amended statement of claim on the basis of \$367.33, he could not be given a judgment for a greater amount, unless his statement of claim was properly amended, and he submitted no motion to that effect. Inasmuch as we believe that a finding for the plaintiff

cannot be said to be against the manifest weight of the evidence and that on such a finding a judgment might properly have been entered in his favor for a larger amount than the judgment appealed from, it follows that the defendant may not be said to have been injured by a judgment awarding the plaintiff less than that amount.

O'Donnell v. National Surety Co., 185 Ill. App. 438.

In urging the contrary, counsel for the defendant has referred to LaBow v. Royal Drug Co., Illinois Appellate Court, First District, case No. 29625; opinion filed June 9, 1925, not yet reported. In that case the plaintiff sued the defendant for a balance of \$1854.00, which he alleged was due him. In his amended statement of claim he alleged that he had been in the defendant's employ, and while in such employ he had bought two trucks from the defendant for \$1850.00, each, the defendant agreeing to take in trade a Ford truck, at a value of \$250.00 and the plaintiff agreeing to pay the balance in installments of \$26.00 a week on each truck, which the defendant was to deduct from the plaintiff's salary from week to week. By its affidavit of merits the defendant denied that there was any such arrangement between it and the plaintiff, but alleged that the plaintiff was employed at a salary of \$75 a week to make certain deliveries of the defendant's goods and collect the amounts due on all C.O.D. deliveries and that in making such deliveries he used two of the defendant's trucks and that the \$26.00 was deducted from the plaintiff's salary each week for his use of the trucks. The defendant also filed a set-off claiming that in the course of his employment the plain-

cannot be said to be against the manifest weight of the evidence and that on such a finding a judgment might properly have been entered in its favor for a larger amount than the judgment appealed from, it follows that the defendant may not be said to have been injured by a judgment awarding the plaintiff less than that amount.

O'Connell v. ... 133 Ill. App. 133.

In making the contrary, counsel for the defendant has referred to Labor v. ... Illinois Appellate Court, First District, case No. 22822; opinion filed June 2, 1922, not yet reported. In that case the plaintiff sued the defendant for a balance of \$1804.00, which he alleged was due him. In his amended statement of claim he alleged that he had been in the defendant's employ, and while in such employ he had bought two trucks from the defendant for \$1250.00 each. The defendant agreed to take in trade a Ford truck, at a value of \$250.00 and the plaintiff agreeing to pay the balance in installments of \$25.00 a week on each truck, which the defendant was to deduct from the plaintiff's salary from week to week. By its affidavit of merits the defendant denied that there was any such arrangement between it and the plaintiff, but alleged that the plaintiff was employed at a salary of \$75 a week to make certain deliveries of the defendant's goods and collect the agents due on all such deliveries and that in making such deliveries he used two of the defendant's trucks and that the \$25.00 was deducted from the plaintiff's salary each week for his use of the trucks. The plaintiff also filed a counter-affidavit that in the course of its employment the plaintiff

tiff had collected an aggregate of \$1761.24, in connection with the G.O.D. deliveries, which he had failed to turn over to the defendant. The opinion states that on the trial of the case the defendant proved by several witnesses that the plaintiff had collected moneys for goods sent G.O.D. and had failed to turn over all of such collections, and that when his employment ceased he was shown to be short more than the amount claimed upon which he was suing. One witness testified that the plaintiff had admitted such shortages to him, but said that notwithstanding such shortages, there was nevertheless due him from the defendant at least \$300. The plaintiff denied the shortages alleged. At the conclusion of all the testimony the court found for the plaintiff in the sum of \$500. In deciding the case this court said that there was no explanation in the record for the court's finding, that if the trial court believed the plaintiff, and did not believe the defendant's witnesses, the finding should have been for the amount claimed by the plaintiff. But if it was assumed that the trial court believed only a part of the plaintiff's testimony, there was still nothing in the record on which a finding of \$500 could be based, and that manifestly the judgment entered by the court, whether or not it was a compromise, as the defendant contended, was contrary to the evidence. It would seem that this court took the position in that case that the finding of the trial court was against the manifest weight of the evidence on the defendant's set-off. We do not consider the case applicable to the situation presented in the case at bar.

For the reasons referred to the judgment of the Municipal Court is affirmed. JUDGMENT AFFIRMED.
TAYLOR AND O'CONNOR, JJ. CONCUR.

tiff had collected an aggregate of \$1782.24, in connection with the G.O.B. deliveries, which he had failed to turn over to the defendant. The opinion states that on the trial of the case the defendant proved by several witnesses that the plaintiff collected money for goods sent G.O.B. and had failed to turn over all of such collections, and that when his employment ceased he was shown to be short more than the amount claimed upon which he was suing. One witness testified that the plaintiff had admitted such shortages to him, but said that notwithstanding such shortages, there was nevertheless due him from the defendant at least \$200. The plaintiff denied the shortages alleged. At the conclusion of all the testimony the court found for the plaintiff in the sum of \$200. In deciding the case this court said that there was no explanation in the record for the court's finding, that if the trial court believed the plaintiff, and did not believe the defendant's witnesses, the finding should have been for the amount claimed by the plaintiff. But it was assumed that the trial court believed only a part of the plaintiff's testimony, there was nothing in the record on which a finding of \$200 could be based, and that manifestly the judgment entered by the court, whether or not it was a compromise, as the defendant contended, was contrary to the evidence. It would seem that this court took the position in that case that the finding of the trial court was against the manifest weight of the evidence on the defendant's behalf. We do not consider the case applicable to the situation presented in the case at bar.

For the reasons referred to the judgment of the Michigan Court is affirmed.

TAYLOR AND O'CONNOR, JJ. CONCUR.

JUDGMENT AFFIRMED.

STEPHEN MUELLER AND HUGO FUHRUGGE.

Plaintiffs in Error.

v.

ALBERT FUCHS, GEORGE PETERSON,
CHARLES FARRILL, WILLIAM MASON,
ANTON ERLER AND HARSHARD GOLD,
SMITH AND PARKER AMUSEMENT COMPANY,
a corp.,

Defendants in Error.)

2411A. 25

ERROR TO

SUPERIOR COURT,

COCKE COUNTY.

Opinion filed Wednesday May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On October 9, 1923, complainants filed their bill against the defendants praying that the defendant Fuchs be decreed to perform specifically the covenants of a lease, wherein he was the landlord and complainants the tenants; that the defendants Mason and Goldsmith deliver to plaintiff immediate possession of certain premises claimed to be covered by an option in this lease; that the defendants Peterson and the Parker Amusement Company, a corporation, be enjoined and restrained from selling food on the premises; that the defendant, Fuchs, be decreed by a mandatory injunction to tear down certain walls and other obstructions and that the defendant Erler be decreed to vacate part of the premises occupied by him as a jewelry store and for general relief. Certain of the defendants answered the bill and others were defaulted; the case was heard before the chancellor and considerable evidence was introduced, at the conclusion of which, the bill was dismissed for want of equity

3411 A. 625

BOOK COUNTY
JANUARY 1906

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DATE 11-11-2009 BY 60322
JANUARY 1906

Opinion filed Wednesday May 5, 1906.

IN RE THE ESTATE OF JAMES H. HARRIS, DECEASED.

THE COURT.

IN RE THE ESTATE OF JAMES H. HARRIS, DECEASED.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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at complainants' costs and they had sued out a writ of error from this court. Albert Fuchs is the only defendant to file a brief in this court, and for convenience he will hereinafter be referred to as the defendant.

So far as it is necessary to state the facts, they are as follows: The defendant owned premises located at the northwest corner of Grace street and Broadway in the City of Chicago, upon which were valuable and extensive improvements, the buildings being occupied by stores on the main floor and the upper floors being used for hotel, lodge meetings, bowling alleys and other purposes. On January 15, 1919, a written lease was entered into between the defendant, as lessor, and Leonard Walders and Julius Walders, lessees, whereby part of the premises known as Nos. 804-808-810 (rear) Grace street were demised for a term beginning February 15, 1919 and ending April 30, 1924, the premises to be used for cafeteria and restaurant purposes. The lease provided that the lessees might have the lunch room, which was then vacant and which adjoined the demised premises on Grace street, upon the payment of an additional rent. There was also a further provision that the lessees should be given "first choice" to the store which fronted on Broadway and which was then under lease to another tenant. The original tenants, the Walders, entered into possession of the premises covered by the lease and occupied the same until July, 1919, when they, with the consent of the landlord, assigned the lease to John Poistner and Louis Zwickel, who took possession of the premises and occupied them until December 1, 1919, when they in turn, with the consent of the landlord, assigned the

to give a copy of the same to the person who has been appointed to receive it. The person who has been appointed to receive it is the only person who is authorized to receive it. The person who has been appointed to receive it is the only person who is authorized to receive it.

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and, as I have said, the same was repeated in the latter part of the year 1915. A witness named John J. O'Connell, who was present at the meeting, testified that the same was repeated in the latter part of the year 1915. A witness named John J. O'Connell, who was present at the meeting, testified that the same was repeated in the latter part of the year 1915.

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lease to the complainants who thereupon took possession of the premises and have conducted a restaurant therein from that time. The vacant store on Grace street, mentioned in the lease, remained vacant until sometime after July 1913 when the assignment of the lease was made when apparently a partition was constructed in the store and part of it was rented by the defendant, Fuchs, to one Lemereaux, who conducted a gift shop therein. The remainder of this store was apparently leased to another person who conducted a saloon for a time. Sometime afterwards these tenants vacated this store and it remained vacant for more than a year. There is a dispute in the evidence between complainants and the defendant about complainants occupying this store. The complainants offered evidence to the effect that the defendant refused to give them the store unless they agreed to pay more rent for it than was mentioned in the lease. On the other hand, defendant offered evidence to the effect that the complainants did not want the store and refused to take it.

The evidence further shows that there was an entrance leading from Grace street into the building past complainants' restaurant; that this entrance was of considerable dimensions and in 1921 defendant enclosed part of it and rented it to another party for business purposes and that this was done over the protest of complainants. The evidence further shows that the store facing on Broadway, at the time of the execution of the lease, in 1913, was occupied by one Hoffman, who had a lease from the defendant for this store which expired May 1, 1923. This is the store to which the lease provided complainants should be given "first choice."

Sometime about 1920 complainants were desirous of obtaining this store and took the matter up with the defendant and it was agreed complainant might have it if they could reach an agreement with Hoffman the tenant. This they attempted to do, but were unsuccessful, because Hoffman wanted \$5,000.00 to vacate and complainants offered him but \$3,000.00. A few days before March 1, 1922, defendant wrote complainant Mueller that if complainants desired this store, they must exercise their option in this regard by March 1, 1922. Complainants offered evidence to the effect that they did not get the letter until after the first of March; that upon receipt of it, they immediately took the matter up with the defendant, with a view of obtaining the store, but the defendant refused to talk to them about the matter. The evidence shows that Hoffman, the tenant in this store sold out to one Goldsmith about March 11, 1922, and Goldsmith entered into possession of the store and conducted his business therein until sometime in 1924 when he went into bankruptcy. There is a conflict in the evidence as to this store, - complainants' evidence tending to show that they from time to time demanded possession of it from the defendant, but that he refused to give it to them, while the evidence on behalf of the defendant was to the effect that in order for complainants to make use of this space in connection with their restaurant, it was necessary to make certain alterations which would cost considerable money and that complainants refused to pay the cost of these alterations.

There is a great deal of other evidence in the record, but we think it would serve no useful purpose to further discuss it in detail. The defendant offered evidence in an

endeavor to show that complainants had breached the lease in failing to pay all of the water taxes levied against the entire premises as required by the terms of the lease. We think it obvious from a reading of the evidence in the record that it was not the intention of the parties that complainants, who occupied but a very small part of the premises, should pay the entire water taxes, but that it was the intention that complainants should pay only for the water used by them in conducting their business and this they did. In this court defendant's counsel seems to admit that this is the fact. This question, however, is immaterial on this appeal and we only refer to it because there was considerable evidence offered touching this question.

Whether the chancellor decided that complainants failed to take possession of the two stores, the one on Grace street and the other on Broadway for the reason given by the defendant and above referred to, or whether he disregarded the conflict of evidence of the parties in this respect, we are unable to determine. But we are clearly of the opinion, that in any view of the case, the decree dismissing the bill for want of equity must be affirmed, because it appears that when complainants on October 9, 1923, filed their bill, the entrance on Grace street had been changed for more than two years into a store which was occupied by a tenant; the Grace street store had been partitioned into two stores for about $1\frac{1}{2}$ years and both stores had been occupied for a time by different tenants. The business conducted in the store on Broadway had been sold by the original tenant, Hoffman, to Goldsmith in 1922 and he had been conducting his business therein for about $1\frac{1}{2}$ years before the bill was filed. In

these circumstances, whatever rights complainants might have had were lost by laches. Equity helps the vigilant, not the negligent. If complainants were entitled to the stores and the defendant refused to give them to them as they contend, and if it was a violation of the terms of the lease for defendant to partition off a part of the entrance and make it into another store and rent it, they should have acted promptly at that time, and by injunction or otherwise prevented the defendant from violating the terms of the lease. But having failed to do so within a reasonable time, they will not now be heard to complain in a court of equity. After this lapse of time a court of equity will not decree the tearing out of the partitions and walls and exclude tenants who have been occupying part of the premises for more than a year. Whatever remedy complainants have, if any, is not to be enforced in a proceeding such as the one at bar.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMPSON, F.J. AND TAYLOR, J. CONCUR.

156 - 30415

CARL D. KINSLEY,

Appellant,

v.

W. C. ZIMMERMAN, ALBERT E. BAKE AND
H. W. ZIMMERMAN, (co-partners as
ZIMMERMAN, BAKE & ZIMMERMAN),

Appellees.

241 I.A. 625

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On August 8, 1923, judgment by confession was entered in favor of plaintiff for \$1245.00 against the defendant, the sum being for rent for the months of February to August, both inclusive, at \$175.00 per month, together with \$80.00 attorney's fees as provided in the lease. On August 24, 1923, on action of the defendants, the judgment was vacated and leave given them to defend, the judgment to stand as security. The case was tried before a judge and a jury and on April 16, 1925, there was a verdict and judgment in favor of the defendants and plaintiff appeals. The defense interposed was a constructive eviction - that plaintiff had failed to make necessary repairs as result of which the premises became untenable and the defendants were obliged to vacate them on January 15, 1923.

The record discloses that the defendants had been occupying a part of the eleventh floor of the Steinway Hall Building, located at Nos. 62-64-66 East Van Buren Street,

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Chicago, under a written lease between themselves and plaintiff for a period of more than ten years; that the premises in question were located on the top floor of the building and extended across the front and entire width of the building. There was a room at one end of this space with dimensions of about 19 ft. by 21 ft. which was used by the defendants for drafting purposes, they being engaged in the business of architecture. In this room five or six people were employed off and on. These employees worked on five or six small tables which were located in the back part of the room where they made blue prints and did other work. Over these tables there extended about 10 feet in length and eight to ten inches from the ceiling, a round pipe which was connected with the roof at one end and the other end projected into a shaft so that when it rained the water would run into this pipe across its entire length and into a pipe in the shaft which connected with the sewer in the basement. This pipe had been leaking from about July, 1922 so that the water dripped down on the tables where the men were working and damaged their work. At times the rain forced the men to move the tables to other parts of the room and on one occasion they were unable to work on account of water dripping from this pipe. The defendants complained of this condition to plaintiff about July or August, 1922, and he agreed to remedy the defect and some temporary repairs were made on the pipe, but apparently without success, as it still continued to leak when there was rain and on August 30, 1922, defendants wrote plaintiff that "The downspout pipe which projects through the roof of our drafting room is again leaking each time it rains. This has resulted in unwarranted damage to our drawings on many occasions. We do

On the 12th, when a witness James Johnson observed and noted
that for a period of more than ten years, that the present
in connection with the house on the top floor of the building
and extension around the front and entire width of the building
and there was a room at one end of this space with dimensions
about 12 feet by 12 feet. It was used as a bedroom for the
household and during the summer, the living room of the
household in connection with the house. It was used for the
household and for the house. These dimensions were in fact in
the walls which were located in the back part of the
room where they made three points and the other work. These
walls which were extended about 10 feet in length and
eight to ten inches from the ceiling, a round pipe which
was connected to the wall at one end and the other end
disappeared into a hole in the wall in which it was not
seen. The hole was in the corner of the wall and the
pipe in the wall which connected with the work in the
basement. The pipe had been located about 10 feet from
the wall and water dripped down on the floor where the
water dripping and damaged their work. It since the time
before the war to when the house was built at the
time and on the basement they were unable to find an account
of water dripping from this pipe. The basement complained
of this condition in January about 10 feet on August, 1905.
and in August of 1905 the house was built and the
water was not in the pipe, but was not in the basement.
in it still continued to leak when there was rain and on
August 12, 1905, the house was built and the house
pipe was built and the water of the basement was in
the basement and the house was built. This was the first time
the house was built in the basement and the house was built.

not believe that it is reasonable to be forced to put up with this nuisance continuously, and must insist that it be given prompt and constructive attention." On September 7th following plaintiff wrote defendants in reply that they had ordered the pipe repaired. On October 23rd the defendants again wrote the plaintiff in the matter and stated: "About eight weeks ago, I wrote you about the leaky conductor pipe that runs through our drafting room. Two weeks after my letter, some workmen came and knocked out some part of the wall around the pipe shaft. It has been that way ever since, so that now in addition to the leakage, we have the benefit of all the dirt and soot from the pipe shaft. This continuous damage to our drawings, some of which are of great value, must stop. We have put up with all of the inconvenience and suffered all of the damage that we think is necessary."

The evidence further shows that sometime after the letter of August 30th, plaintiff took up the matter of making repairs and ordered a plumber to install a new pipe and that to install this pipe, it was necessary for the workmen to remove part of wall around the pipe shaft and they did this, making an opening from eighteen to twenty-four inches in diameter; that the defendants advised plaintiff that the work must be done on some Sunday, so as not to interfere with defendants' work, and this was agreed to; that plaintiff ordered the pipe and he had the old pipe removed and the new one installed about the 18th or 20th of November, but the opening in the shaft was not filled up.

and believe that it is possible to be found in the
with this information, and was found
that it be given to the committee on the
of September 1940 following receipt of the
is really that they had ordered the type required. On
October 1940 the committee again wrote the district
in the matter and stated: "About eight weeks ago,
wrote you about the heavy condensed type that was
through an existing room. The work at that time
some sixteen lines and needed not more than of the
around the type sheet. It has been that way ever since,
as that was in addition to the message, we have the same
the at all the days and need from the type sheet. This
work, some damage to my drawings, some of which are of
great value, must stop. We have not up with all of the
information and believe all of the work that we
will be completed."

The committee further stated that during the
of the type sheet, the committee had been
the message and ordered a change to be made in the
and that to be made. It was necessary for the work
was to cover part of the sheet around the type sheet and they
the date, making an opening from the sheet to the
in the message; that the committee advised the district
that the work was to be done on the sheet as on not to
interview with the committee, and that this was agreed to
that the committee ordered the type and the sheet was
ordered and the work completed. The work was not
of the work, but the opening in the sheet was not filled up.

After the pipe was installed, on December 4, 1923, defendants again wrote plaintiff as follows: "The situation in our office as a result of the delapidated condition of the building, is such that we can no longer tolerate the inconvenience and financial loss which we have been called upon to suffer repeatedly during the last year. The drain pipe runs through the drafting room, (to which we have called your attention repeatedly during the last eight months) leaks to a far greater degree than ever before, and today has put the drafting room out of commission. The draftsmen cannot work, which entails a great financial loss to us, especially in this busy season. The window sills around the building, all slope backward instead of toward the outside with the result that the water drives under the sash and down the walls. The decorating which you required us to do at our own expense, is therefore destroyed in a number of places. From the same cause, the top of one of our office desks has been ruined. As far as this particular office is concerned, the building is not tenable nor habitable, which condition is (not) to be expected in any place where rent is charged.

If we are to remain here as tenants, we demand that the following matters be attended to at once, and in a satisfactory manner:

1. Repair roof over drafting room to prevent further leakage at this point.

2. Reset window sills throughout the office to prevent water from driving in at these points.

3. Redecorate all portions which have been damaged as a result of these leaks.

4. Refinish top of mahogany desk in front office.

...the sign was installed on September 4, 1933, following
...this sign should be removed. The situation is one
...as a result of the continued operation of the building
...such that we can no longer tolerate the presence of
...and financial loss which we have been called upon to suffer
...repeatedly during the last year. The house was then
...the building room, (to which we have called your attention
...consequently during the last night meeting) looks to a far
...greater degree than ever before, and today has the same
...ing was out of consideration. The situation cannot wait, this
...with a great amount of time and expense, is the only
...course. The situation also around the building is such
...remains standing in front of the building with the result that
...the street driver under the arch and down the walk. The
...overlooking it has requested us to do so at our expense.
...is therefore suggested in a number of places. From the
...your money, the top of one of the pillars must be
...removed. As for the other pillars, they are in condition and
...believe in the possibility of their removal, which condition is
...to be removed in the same way as suggested.

If we are to have a house in the future, we demand that
...the building should be returned to its owner, and in a matter

- Respectfully,
1. Request that your committee be informed
2. Request that your committee be informed
3. Request that your committee be informed
4. Request that your committee be informed
5. Request that your committee be informed
6. Request that your committee be informed
7. Request that your committee be informed
8. Request that your committee be informed
9. Request that your committee be informed
10. Request that your committee be informed

Unless these matters are attended to with promptness and care, we shall consider the inconvenience and loss which we have suffered, ample invalidation of the lease and shall seek other quarters, notwithstanding the fact that we have been tenants of this building for thirty years." Plaintiff did nothing after he received this letter. The defendants continued to occupy the premises and on January 10, 1923, paid the rent for that month and a few days later vacated the premises.

In addition to the foregoing evidence, witnesses testified on behalf of the defendant as follows: E. McBride testified that he was an architect and a member of the firm which had occupied the premises in question for approximately ten years; that about one-half of the space was occupied by the drafting room; that five or six people were employed off and on in that room; that there was a drain pipe six or eight inches in diameter running along the ceiling as above set forth; that it had been put in about thirty years before; that it leaked in the early part of the summer of 1922 every time it rained, and that this continued until defendants vacated the premises; that the water damaged the drafting boards which were located under the pipe and also some drawings were damaged; that the water dripped off this pipe on to the drawings; that through the opening made in the shaft by the workmen, quite an amount of dust and dirt blew into the room; that several times it was so bad they had to stop work for a short time. On cross-examination he testified that he did not know exactly where the leak was in the pipe; that he knew

several attempts had been made to stop the leak; that he saw men working there; that the water ran off the elbow of the pipe and dropped on the tables where the men worked; that a new pipe was put in by plaintiff; that the pipe that extended along the ceiling was about ten feet from the floor; that he had no specimens of the material which had been damaged by dust and smoke.

Albert M. Sax, one of the defendants, testified that he wrote the several letters above referred to; that prior to August 30, 1922, he called plaintiff's attention several times to the fact that the roof was leaking and that the water fell on the drafting tables; that every time he talked with plaintiff the latter promised to make repairs; that plaintiff tried to fix it prior to August 30th; that the horizontal pipe had been replaced; that the opening of the shaft was made before October 23rd, 1922 and had never been fixed; that soot came through this opening into the room. On cross-examination he testified that he had eight tables in three rows in the room; that they were covered with oil cloth; that when it rained they changed the whole drafting room around; that they did not keep any defaced or spoiled drawings which had been damaged by the rain or smoke; that previous to December 4th, when he came back from lunch one day, he found the drafting room out of commission; that draftsmen were working in another portion of the office that day; that he saw the water on the boards and on the table and a pail had been suspended under the elbow of the pipe; that he would not say how much water was in the pail; that the floor and the water was then mopped up; that when it rained the engineer of the building would come up in reply to their calls and

by that was made.

He had no recollection of the material which had been changed along the walking way about ten feet from the floor, that a new pipe was put in by himself; that the pipe had extended five and a half feet on the ceiling above the new work; that now existing there; that the water ran off the sides of the various openings and down into the tank that he had to remove.

Albert H. Cox, one of the defendants, testified that he wrote the above letter about a month before the trial. He called the letter "the letter" and said that it was the only one of the kind that he had ever written. He said that he had never seen the letter before and that he had never seen the letter after the trial. He said that he had never seen the letter after the trial and that he had never seen the letter after the trial.

attempt to fix the roof; that he wanted the work done on Sunday so as not to interfere with the work in the drafting room.

John Rinelanders testified that he was employed in the drafting room and worked on a table under the pipe; that on several occasions water dripped off the pipe onto his table; that dust blew in the opening made in the shaft; that he could not fix any date when they were unable to work on account of the dust and dirt or rain; that on one occasion the water leaked down so badly that they spent the afternoon in shifting around tables to find space where they could work without being bothered with the water; that the tables used in the drafting room were about as large as an ordinary desk.

Plaintiff introduced evidence in rebuttal tending to show that upon being notified that the pipe was leaking he endeavored to repair it and afterwards he had a new pipe installed. He also offered evidence to the effect that the pipe had not leaked after the new one had been installed and that the defendants vacated the premises not because of the fact that water dripped from the pipe, but because they were anxious to move into a new building where other architects were going; that the defendants had several months before they vacated the premises, talked with plaintiff about subletting the space occupied by them. This evidence was erroneously excluded by the court. Instructions were given in writing by the court and complaint is made as to several of them, but upon a examination of the record, we are unable to say at whose request the instructions were given. But in the view we take of the case, it will be unnecessary to

attempts to fix the roof; that he wanted the work done on Sunday so as not to interfere with the work in the building.

There.

John Lindenberg testified that he was employed in the building room and worked on a boiler under the pipe; that on several occasions water leaked off the pipe onto the floor; that this pipe in the morning made in the shaft; that he could not fix any date when they were unable to work of account; the pump and drive or using; that on one occasion the water leaked down so badly that they spent the afternoon in waiting around holes to find where the water was; that the water without being bothered with the water; that the holes made in the building room were about as large as an ordinary hole.

Witness introduced evidence in rebuttal tending to show that upon being notified that the pipe was leaking he returned to repair it and afterwards he had a new pipe installed. He also offered evidence to the effect that the pipe had not leaked after the new one had been installed and that the defendant vacated the premises not because of the fact that water dripped from the pipe, but because they were unable to move into a new building where other apartments were being built. The defendant had several months before they vacated the premises, talked with plaintiff's agent and telling the agent that he was leaving the premises and that he would be back in a few days. The defendant was then in the building of the house and the house was in a state of repair, but when a reconstruction of the house, no one could be put in there except for a few days. It will be unnecessary to

refer to the evidence offered on behalf of plaintiff, nor to discuss the question regarding plaintiff's refused instructions, for we are of the opinion that the court should have instructed the jury to find the issue for the plaintiff at the close of the defendants' case as requested by the plaintiff, because where the evidence is considered most favorably to the defendants, it is insufficient as a matter of law, to warrant the conclusion that there was a constructive eviction. It is not every failure of the landlord to repair that will justify the tenant in vacating the premises on the ground that there was a constructive eviction. If he has sustained damages on account of the landlord failing to repair, he has his remedy. Maben v. Hill, 213 Ill. 533.

Under the law where a tenant vacates the premises and contends that there was a constructive eviction on account of the failure of the landlord to repair, it has been repeatedly held that to constitute such an eviction there must be something of a grave and permanent character done or omitted by the landlord with the purpose and intent of depriving the tenant of the enjoyment of the premises. Gibbons v. Hoefield, 239 Ill. 455. It was there held that whether such facts appear is generally a question of fact for the jury. The question of a constructive eviction was held in the Gibbons case to be one for the jury and the judgment of this court and the Circuit Court were reversed, because it had been there held that the question was one of law. But in that case the proof showed that the basement

to the evidence offered on behalf of the plaintiff.

But on the other hand the evidence is not sufficient

to establish the plaintiff's case, for we are of the opinion that

the court should have instructed the jury to find the

issue for the plaintiff on the issue of the defendant's

case as requested by the plaintiff, because where the

evidence is considered most favorably to the defendant,

it is insufficient as a matter of law, to warrant the con-

clusion that there was a constructive eviction. It is

not very far from the landlord to require that will

justify the tenant in vacating the premises on the ground

that there was a constructive eviction. It is not un-

reasonable to require on account of the landlord failing to re-

pair, as in this case, Wright v. Hill, 112 Ill. 233.

Under the law where a tenant vacates the premises

and contends that there was a constructive eviction on

account of the failure of the landlord to repair, it is

not sufficient to show that the premises were in a state

where they could be occupied by a tenant and reasonable repairs

could be made by the landlord after the tenant had moved

in occupying the premises in the premises in the premises.

Wright v. Hill, 112 Ill. 233. It was held that the

tenant was not entitled to a decree of eviction on the

fact that the premises were in a state of disrepair and

that the tenant was not able to occupy the premises.

It is not sufficient to show that the premises were in a

state where they could be occupied by a tenant and reason-

able repairs could be made by the landlord after the tenant

floor of the premises in question was sometimes flooded with two inches of water and other facts appeared in that case which showed that the premises there occupied by the tenant could not be used by the tenant in the conduct of his clothing business.

In the case before us we think it is clear that the defects in the premises were insufficient as a matter of law to warrant the court in submitting the case to the jury on the question of constructive eviction. The evidence shows that some water dripped from the pipe, which ran parallel with the ceiling and that soot and smoke came into the premises through the opening made in the shaft, and it is to be noted that in defendants' letter of October 23rd they refer to the fact that dirt and soot had come into the room through the hole made in the shaft. In their letter of December 4th, the new pipe having been installed between those dates (about November 18th) no mention is made of soot or dirt, but there the defendant specifies the repairs they demanded, viz: (1) Prevent the leaking of the water through the roof; (2) That the window sills of the premises be re-set; (3) Certain portions of the walls re-decorated; and (4) Top of a mahogany desk be refinished. On the trial no evidence was offered on the question of the re-setting of the window sills. Of course, this did not come under any repairs required to be done by plaintiff. Nor would the defendants be warranted in claiming that they had been constructively evicted by reason of the plaintiff failing to re-decorate certain portions of the walls and re-finishing the mahogany desk. But, of course, we cannot weigh

1. The first of these is the fact that the
2. Government has not been able to secure
3. the necessary funds to carry out its
4. policy of non-interference in the
5. internal affairs of the country.
6. The second is the fact that the
7. Government has not been able to secure
8. the necessary funds to carry out its
9. policy of non-interference in the
10. internal affairs of the country.

[illegible]

the evidence but merely refer to it to show that under the most favorable view, the failure on behalf of plaintiff was of such a character as would not warrant the defendants in vacating the premises on the ground of a constructive eviction.

Since there is no dispute of the amount due and since the court should have directed a verdict at the close of the case in favor of plaintiff as he requested, the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to confirm the judgment entered by confession in favor of plaintiff and against the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P. J. AND TAYLOR, J. CONCUR.

the same day, and at 11 AM, the vessel was ordered to
 proceed to the point of destination, and to remain there until
 further orders. The vessel was ordered to proceed to the point of
 destination, and to remain there until further orders. The vessel
 was ordered to proceed to the point of destination, and to remain
 there until further orders.

The vessel was ordered to proceed to the point of destination,
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The vessel was ordered to proceed to the point of destination,
 and to remain there until further orders.

The vessel was ordered to proceed to the point of destination,
 and to remain there until further orders.

G. LYNN OSMER, ET AL,

Appellees,

v.

WM. J. MCCARTHY, ET AL,

Appellants.)

241 I.A. 625

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiffs brought suit against the defendants, claiming that they had been damaged in the sum of \$25,000.00 by reason of the defendants' breach of a written contract entered into between plaintiffs and defendants. Afterwards plaintiffs got leave to file an amended statement of claim and to increase the ad damnum to \$35,000.00. The amended statement of claim was filed. The defendant filed an affidavit of merits, admitting the execution of the written contract, but averring that the breach had been committed by plaintiffs and not the defendants. Apparently with a view of not being out done by plaintiffs, defendants filed a claim of setoff, claiming that they had been damaged in the sum of \$25,000.00, on account of plaintiffs' breach of the contract. To this claim of setoff, plaintiffs filed an affidavit of merits. The case was tried before the court without a jury and there was a finding and judgment in plaintiffs' favor for \$1700.00 and the defendants appeal.

The written contract which is in evidence and which was executed by plaintiffs and defendants on the 21st of

341 I.A. 682

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Opinion filed May 5, 1936.

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June, 1924, is unintelligible. But from it and from the evidence in the record, we are able to gather that plaintiffs agreed to buy from the defendants 50,000 "profit coins" within one year from the date of the contract for which plaintiffs were to pay the defendants fifty cents per coin. The coins were to be purchased in installments; 400 when the agreement was signed; 600 within ten days; 1000 within thirty days; 2,000 within sixty days and 46,000 within one year from the date of the contract. The evidence showed that plaintiffs paid the defendants in installments from the date of the contract until August 27, 1924, \$1700.00, and that they received none of the coins for which they had paid, except two or three as samples. On September 16, 1924, defendants gave plaintiffs a written notice that defendants had declared the contract cancelled for the reason that plaintiffs had violated the conditions of the contract. Plaintiffs offered no evidence to substantiate their claim for \$35,000.00, except the payment of \$1700.00; nor did the defendants offer any evidence to substantiate the \$25,000.00 claimed in their setoff. The evidence further showed that plaintiffs did not invest any of their own money, but that they borrowed the \$1700.00 from a Miss Galloway and a Mr. Hamilton for which plaintiffs agreed to give Miss Galloway and Mr. Hamilton a certain percentage of the profits that might be received by plaintiffs growing out of the contract entered into between plaintiffs and defendants. Plaintiffs also offered evidence tending to show that they had on four occasions demanded delivery of the "profit coins" but that the defendants had

The contract was made on the 1st day of January, 1900, between the Plaintiff and the Defendant, and the terms of the contract were as follows: The Defendant was to pay to the Plaintiff the sum of \$100,000 within six months of the date of the contract, and the Plaintiff was to deliver to the Defendant the sum of \$100,000 within six months of the date of the contract. The Defendant failed to pay the Plaintiff the sum of \$100,000 within six months of the date of the contract, and the Plaintiff is now suing the Defendant for the sum of \$100,000.

neglected to make any delivery. On the other hand, the defendants gave evidence tending to show that they tendered some of the coins to plaintiffs, but that the latter stated that they were not then ready to receive them.

The defendants contend that the judgment is wrong and should be reversed because it appeared that Miss Galloway and Mr. Hamilton were parties in interest and should have been joined as plaintiffs. We think there is no merit in this contention, since the evidence shows that plaintiffs borrowed the \$1700.00 from Miss Galloway and Mr. Hamilton and agreed, in consideration of this loan, to give Miss Galloway and Mr. Hamilton an interest in the profits that plaintiffs expected to receive by virtue of the written contract entered into between plaintiffs and defendants. As stated the contract is unintelligible, except that it provides that plaintiffs were to buy from the defendants 50,000 "profit coins" and to pay, therefor fifty cents apiece. The coins were to be delivered in installments and paid for, and nothing appearing to the contrary, the presumption is that the several installments would be delivered upon payment being made. And the evidence is undisputed that plaintiffs paid the defendants \$1700.00, but received no coins and therefore, plaintiffs having received nothing for their money and defendants having cancelled the contract, plaintiffs were entitled to recover back the \$1700.00.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

suggested to send the University. On the 10th of May, the
 University of London received the letter of the 10th of May, and
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The University of London received the letter of the 10th of May, and

211 - 30472

VIOLET SAAL ROBERTS, (formerly
Violet Saal)

Appellee,

v.

HENRY G. SAAL,

Appellant.)

211 V. 1 26

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

By this appeal Henry G. Saal seeks to reverse
an order entered on July 6, 1925, ordering that he pay
\$1806.92 to Violet Saal Roberts, as solicitor's fees and
costs as decreed by a decree of divorce theretofore enter-
ed and adjudging that in default of such payment he be
confined to the common jail of Cook County.

Violet Saal filed her bill for divorce against
Henry G. Saal, charging cruelty. He filed a crossbill
against her praying for a divorce on the ground of adultery.
After the issues were made up the cause was heard and on
September 3, 1924, a decree was entered finding that she had
not proven the case stated in her bill and it was dismissed
for want of equity. The decree also found that Henry G.
Saal had sustained the allegations of his crossbill and a
decree found that an allowance of \$2500.00 had been made to
Violet Saal as and for temporary solicitor's fees. It also
found that her solicitors were entitled to \$5,000.00 more

VERNON EARL ROBERTS, (formerly
Alvin Earl)

Appellant,

v.

W. Y. S. Sall.

Appellee.

Opinion filed May 5, 1936.

MR. JUSTICE O'DONOHUE delivered the opinion of

By this appeal Henry G. Earl seeks to reverse
an order entered on July 6, 1935, ordering that he pay
\$100.00 to Vernon Earl Roberts, an collector's fee and
costs as claimed by a decree of divorce theretofore entered
of and adjudging that in default of such payment he be
committed to the common jail of Cook County.

Alvin Earl filed her bill for divorce against
Henry G. Earl, charging adultery. He filed a crossbill
against her praying for a divorce on the ground of adultery.
After the issues were set up the court was held on
September 5, 1934, a decree was entered finding that she had
not proven the case stated in her bill and it was dismissed.
Her writ of certiorari. The decree also found that Henry G.
Earl had maintained the allegations of his crossbill and a
decree found him an allowance of \$2500.00 had been made to
Alvin Earl and for temporary collector's fees. It also
found that her collector's were entitled to \$5,000.00 more

SALE T. A. 626

RECEIVED FROM

SUPERIOR COURT.

COOK COUNTY.

and it was decreed that the \$5,000.00 be paid by Henry G. Saal in three equal installments, thirty, sixty and ninety days after the entry of the decree. The decree also awarded Violet G. Saal alimony to be paid by the defendant at the rate of \$500.00 per month. The first payment to be made two days after the entry of the decree, namely on September 5, 1924, and the monthly payments were to continue until the remarriage of Violet Saal, but in no event were they to continue after the expiration of two years from the date of the decree.

On February 2, 1925, Violet Saal Roberts (the former wife of Henry G. Saal, she having on October 4, 1924, married Roberts, who was named as co-respondent in the cross-bill filed by Henry G. Saal) by leave of court, filed her petition praying that a rule be entered on Henry G. Saal to show cause why he should not be attached for contempt of court for failure to pay the third installment, amounting to \$1666.67 due her as and for her solicitors fees, together with \$140.25 court costs incurred in the divorce proceedings, both of which sums it was decreed in the divorce decree should be paid by Henry G. Saal. To this petition Henry G. Saal filed an answer and after a hearing his answer was stricken and an order entered on the 6th of July, 1925, finding that there was due and owing from Henry G. Saal to Violet Saal Roberts the two sums above mentioned, aggregating \$1806.92; that he had shown no cause why he should not pay this sum and it was ordered that he pay the \$1806.92 within thirty days, in default of which he be confined in the County Jail. It is from this order

and it was decreed that the \$3,000.00 be paid by Henry G. Seal in three equal installments, thirty, sixty and ninety days after the entry of the decree. The decree also awarded Violet G. Seal alimony to be paid by the defendant at the rate of \$500.00 per month. The first payment to be made two days after the entry of the decree, namely on September 8, 1934, and the monthly payments were to continue until the remaining of Violet Seal, but in no event were they to continue after the expiration of two years from the date of the decree.

On February 2, 1935, Violet Seal Roberts (the former wife of Henry G. Seal, who having on October 4, 1934, married Roberts, who was named as co-respondent in the divorce bill filed by Henry G. Seal) by leave of court, filed her petition praying that a wife be entered on Henry G. Seal to show cause why he should not be attached for contempt of court for failure to pay the third installment, amounting to \$1500.00 due her as and for her sole and separate use, together with \$150.00 court costs incurred in the divorce proceedings, both of which sums it was decreed in the divorce decree should be paid by Henry G. Seal. To this petition Henry G. Seal filed an answer and after a hearing his answer was stricken and an order entered on the 6th of July, 1935, finding that there was due and owing from Henry G. Seal to Violet Seal Roberts the two sums above mentioned, aggregating \$1500.00; that he had shown no cause why he should not pay this sum and it was ordered that he pay the \$1500.00 within thirty days, in default of which he be confined in the County Jail. It is from this order

of July 6, 1925 that Henry G. Saal appeals.

The record discloses that on September 5, 1924, which was two days after the decree of divorce was entered, Henry G. Saal paid his former wife \$500.00 alimony as provided in the decree; that on September 29, 1924, or shortly prior thereto, Violet G. Saal represented to Henry G. Saal that she was desirous of making a settlement of all claims she had for alimony for \$5,000.00 to be paid at once; that this proposition was not accepted by Henry G. Saal, apparently for the reason that he was short of ready funds, but on September 29th he executed his three promissory notes of that date for \$500.00 each, payable to Violet Saal, the notes being payable October 15th, November 15th and December 15th respectively, and at the same time Violet Saal made and delivered to Henry G. Saal a receipt acknowledging receipt of the three notes, wherein it was stated that the \$1500.00 represented by the notes was payment in advance of installments of alimony due respectively October 5th, November 5th and December 5th after date under decree entered September 3, 1924 in the Superior Court case, Gen. No. 393306. This receipt was witnessed by the solicitors for both parties and in accordance with the prior agreement Violet Saal discounted these three notes with a bank, the discount being charged against Henry G. Saal and she receiving the \$1500.00. Afterwards Henry G. Saal paid two installments of the solicitors' fees which fell due in October and November of 1924, taking receipts therefor signed by Violet Saal, by her solicitors. On October 24, 1924, Violet Saal married Henry T. Roberts at St. Louis, Mo. and under the terms of the

of July 6, 1934 that Henry G. Seal appeals.

The record discloses that on September 5, 1934, which was two days after the decree of divorce was entered, Henry G. Seal paid his former wife \$500.00 alimony in promissory notes, dated September 29, 1934, or shortly thereafter, which were payable to Henry G. Seal. That she was desirous of having a settlement of all claims one had for alimony for \$5,000.00 to be paid at once; that this proposition was not accepted by Henry G. Seal, partly for the reason that he was short of ready funds, but on September 29th he executed his three promissory notes of that date for \$500.00 each, payable to Violet Seal, the notes being payable October 15th, November 15th and December 15th respectively, and at the same time Violet Seal made and delivered to Henry G. Seal a receipt acknowledging receipt of the three notes, wherein it was stated that the \$1500.00 represented by the notes was payment in advance of installment of alimony due respectively October 5th, November 5th and December 5th after date under decree entered September 5, 1934 in the Superior Court case, Gen. No. 333308. This receipt was witnessed by the solicitors for both parties and in accordance with the prior agreement Violet Seal delivered these three notes with a bank, the discount being charged against Henry G. Seal and she retaining the \$1500.00. Afterward Henry G. Seal paid two installments of the alimony, one which fell due in October and November of 1934, taking receipts therefor signed by Violet Seal, by her solicitors. On October 24, 1934, Violet Seal married Henry G. Seal at St. Louis, Mo. and since that time of the

divorce decree no alimony was due her after that date. On the trial Henry G. Saal, through his solicitor, sought to have the alimony of \$1500.00 which he had paid in advance, credited on the \$1806.92, which would leave a balance of \$306.92, and which latter sum he tendered in open court. The alimony and solicitors' fees were payable to Violet Saal and she having received \$1500.00 of alimony that she was not entitled to on account of her marriage to Roberts, she ought in equity and good conscience to give credit for this amount and the chancellor was in error in not discharging the ruling when Henry G. Saal tendered in court the \$306.92. The fact that the \$1806.92 would ultimately go to the solicitors, can make no difference under the law and under the decree. The payment was to be made to her. If Violet Saal's solicitors desired to protect themselves, they should have taken some action, because they knew that Violet Saal was to receive \$1500.00 alimony in advance, her solicitor having signed the receipt as a witness at the time it was given to her.

The order of the Superior Court of Cook County is reversed and the matter remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

divorce decree as alimony was due her after that date. On the trial Henry G. Seal, through his solicitor, sought to have the alimony of \$1500.00 which he had paid in advance, credited on the \$1500.00, which would leave a balance of \$300.00, and which latter sum he tendered in open court. The alimony and solicitor's fees were payable to Violet Seal and she having received \$1500.00 of alimony that she was not entitled to on account of her marriage to Roberts, she sought in equity and good conscience to give credit for this amount and the chancellor was in error in not discharging the ruling when Henry G. Seal tendered in court the \$300.00. The fact that the \$1500.00 would ultimately go to the solicitors, can make no difference under the law and under the decree. The payment was to be made to her. If Violet Seal's solicitors desired to protect themselves, they should have taken some action, because they knew that Violet Seal was to receive \$1500.00 alimony in advance, her solicitor having signed the receipt as a witness at the time it was given to her.

The order of the Superior Court of Cook County is reversed and the matter remanded for further proceedings not inconsistent with the above herein expressed.

REVEREND AND HONORABLE.

THOMAS, J. L. AND TAYLOR, C. JUDGES.

MICHAEL ZIMMER, Former Sheriff of
Cook County, State of Illinois, for
use of Wayne Schwartz,

Appellee,

v.

THOS. F. BANNAHAN, ET AL, On appeal
of PATRICK DEVERY,

Appellant.

241 I.A. 626

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought an action on a replevin bond
against the defendant who was surety. The case was tried
before the court without a jury, there was a finding and
judgment in plaintiff's favor for \$1103.00, and the defend-
ant appeals.

There was no dispute in the evidence. One witness
testified on behalf of the plaintiff as to the reasonable
charge of the attorneys services rendered on behalf of the
defendant in the replevin suit in which the bond was given.
And one witness testified on behalf of the defendant. Cer-
tain documentary proofs were made and the court found the
facts to be as follows: that on October 31, 1914, Wayne
Schwartz, the ussee named in this case, caused judgment by con-
fession to be entered in the Municipal Court of Chicago in
her favor and against M. G. Duggan for \$1720.00, the judg-
ment being entered on a judgment note given by Duggan to

Schwartz, dated April 28, 1912 for the sum of \$1500.00 payable one year after date; that on the date the judgment was entered, execution was issued on the judgment and delivered to the bailiff of the Municipal Court, who served the same upon Duggan and within ten days Duggan filed a schedule of his personal property, which consisted of personal effects and some small claims which he held against certain parties. On October 27, 1914, the bailiff levied on the personal property located in a saloon at No. 1686 Ogden avenue. On the next day Thomas F. Hanrahan, brought an action of replevin and the goods and chattels were taken by the sheriff from the bailiff and delivered to Hanrahan. In the replevin action, Hanrahan as principal and the defendant, Devery as surety executed the bond on which the present action is based. Hanrahan's replevin suit was brought in the Circuit Court of Cook County. The case was pending in that court for more than three years and on February 21, 1918, it was dismissed for want of prosecution and a writ of reterno habendo awarded. The property not being returned, the instant case was brought on the replevin bond.

It further appeared that Duggan against whom the judgment by confession was entered in the Municipal Court in favor of Schwartz, from sometime in the year of 1912 and up to May 29, 1913 owned and operated a saloon at No. 1686 Ogden avenue, and during that time Hanrahan was employed by Duggan as a bar tender. On or about April 29, 1912 Hanrahan loaned Duggan \$1500.00 and took Duggan's note for the amount, payable on April 29, 1914, secured by a chattel mortgage on

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and has throughout all its history been a free and open market.

the same upon the ground that it was not a scheduled

and an altered relationship with the world, the individual and the community.

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the furniture, fixtures, stock of liquor, etc. in the saloon. The leasehold interest held by Duggan on the premises, as well as the license to conduct the saloon, were assigned to Hanrahan. The chattel mortgage was acknowledged April 14, 1913, before the clerk of the Municipal Court and recorded in the Recorder's office. About a year afterwards, on May 29, 1913, Hanrahan paid Duggan the further sum of \$500.00 and received from Duggan a bill of sale of "all goods and chattels in the premises at No. 1586 Ogden avenue", together with the stock of wines, liquors and cigars. The bill of sale was acknowledged by both parties, but not recorded. The record then shows that upon receipt of the bill of sale on May 29, 1913, Hanrahan took over the management and control of the saloon, claimed to own the saloon and all property in the premises and continued to operate it until the going into effect of the National Prohibition Act in the year 1918. The court also found that "there was, however, no outward, visible change of possession from Duggan to Hanrahan, from receipt of said bill of sale by Hanrahan up to 1918 of any property in said premises and both Duggan and Hanrahan remained on said premises, the same as before the giving of said bill of sale." The record further shows that after Hanrahan bought the saloon from Duggan and took over the same, he employed Duggan as his bartender and paid him a salary of \$25.00 to \$28.00 per week; that after the taking over of the saloon by Hanrahan, he paid all bills such as the rent for the premises, electric light, gas, liquor bills, insurance and installments on an electric piano; that Hanrahan from the time he took over the saloon in May, 1913, operated under the license issued to Duggan until the following October

and thereafter the license was issued by the city authorities to Hanrahan every six months thereafter until he went out of business when the Prohibition Act went into effect in the year 1918. Hanrahan paying for the license \$500 every six months.

It further appears that at the time Hanrahan bought the saloon, there was a sign on the front of the premises reading "M. C. Duggan", which was allowed to remain until after the replevin suit was brought. It appears that the retail saloon licenses issued to Hanrahan were always posted up along side of the cash register in the saloon from October, 1913, until the saloon was closed in 1918. The value of the property replevied by Hanrahan was \$750.00. The items making up this amount were specifically set out in the record. There is some contention that the property valued at \$750.00 was not all of the property that had been replevied by Hanrahan, but in the view we take of the case, this is immaterial.

From the foregoing facts, which are undisputed, it clearly appears that the sale of the saloon by Duggan to Hanrahan was bona fide in every respect, Hanrahan paying, therefore, \$2000.00, and there is no contention or intimation that this was not a fair price. It also appears, without dispute that from the time of the sale, May 1913, Hanrahan conducted the saloon and the business was carried on in his own name openly, there being no attempt to deceive the public or any one. But counsel for plaintiff contends that although the sale was bona fide as between Duggan and Hanrahan, yet it was void as against creditors, because there

and thereafter the license was issued by the city engineer
and thereafter every six months it was renewed until he was
out of business when the expiration was not into effect in
the year 1920. He was paying for the license \$500 every

in 1920 he was informed that at the time he was paying
the license, there was a sign on the front of the premises
reading "A. J. Higgins" which was allowed to remain until
after the expiration date was changed. It appeared that the
license was issued to Higgins and he was not allowed to
up along side of the main register in the Nelson from 1915
until 1917, until the Nelson was closed in 1918. The value
of the property registered by Higgins was \$750.00. The issue
making up this amount were specifically set out in the re-
cord. There is some contention that the property valued
at \$750.00 was not all of the property that had been registered
by Higgins, but as the value of the land, this is
material.

From the foregoing facts, it is seen that
it is clearly apparent that the sale of the Nelson is subject to
Higgins and that it is a very simple, business matter.
Higgins, Higgins, and Higgins is an association of business
men and it was not a legal matter. It is also apparent that
the Nelson was sold from the time of the sale, and Higgins
has indicated the Nelson and the Nelson was sold to him
for cash only, there being no interest in Higgins and
Higgins as yet. It is also apparent that Higgins was
that although the sale was made in 1917 as Higgins was
Higgins, yet it was sold as legal business, business that

was no change of possession and that it is the law that where personal property is sold, but there is no change of possession, the sale, as to creditors, is fraudulent per se. The law has long been established in this state as counsel contends. Reed v. Rames, 12 Ill. 584; Gass v. Pease, 79 Ill. App. 308; Fickner v. McClelland, 24 Ill. 471. It is argued on behalf of plaintiff that there being no evidence before this court in the record, the finding of the trial judge is conclusive, and that since the trial court found that although Duggan sold out the saloon to Hanrahan, "There was, however, no outward visible change of possession from Duggan to Hanrahan from the receipt of said bill of sale by Hanrahan up to 1918 of any property in said premises, and both Hanrahan and Duggan remained on said premises as before the giving of the bill of sale," the sale as to Mayme Schwartz is fraudulent per se. With this contention we are unable to agree. The court found the evidentiary facts in the case which we have above set forth, but his finding that there having been no change of possession upon the sale, is not an evidentiary fact, but is the court's conclusion from the facts as found by him, and we are unable to agree with the conclusion of the learned trial judge to the effect that there was no visible change of possession, but on the contrary, we are of the opinion, that there was such a visible change of possession as to render the sale valid as to creditors. This appears from the fact that immediately upon the execution of the bill of sale Hanrahan took possession of the saloon and conducted it as his own business openly. He paid all the bills, such as the rent, light and liquor bills, etc. by check.

He also paid the City of Chicago every six months \$500.00 for the license which was issued by the city to him. The license was exhibited in a conspicuous place, near the cash register, where all could see it. It was in Hanrahan's name. He had conducted the saloon as his own for about seventeen months before the execution was levied on the property and he continued to conduct it thereafter for over three years until the going into effect of the National Prohibition Law. We think the change of possession was such as to render the sale valid as to creditors and every one. McCord v. Gilbert, 64 Ill. App. 233; Hess v. Pease, supra; Brown v. Wiley, 83 Ill. 46; Pease v. Dawson, 97 Ill. App. 620; Blakely Printing Co. v. Pease, 85 Ill. App. 341.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of the plaintiff and against the defendant for the nominal sum of \$1.00.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

On the 11th of March 1944 the British Army was informed that the German forces were in the process of withdrawing from the Western Front. This was confirmed by the German High Command on the 12th of March 1944. The British Army was ordered to advance into Germany and to capture the German cities of Cologne, Aachen, and Bonn. The British Army was successful in capturing these cities and in advancing into Germany. The German forces were defeated and the British Army was victorious.

The British Army was successful in capturing the German cities of Cologne, Aachen, and Bonn. The German forces were defeated and the British Army was victorious. The British Army was successful in capturing the German cities of Cologne, Aachen, and Bonn. The German forces were defeated and the British Army was victorious.

THE BRITISH ARMY WAS SUCCESSFUL IN CAPTURING THE GERMAN CITIES OF COLOGNE, AACHEN, AND BONN.

THE GERMAN FORCES WERE DEFEATED AND THE BRITISH ARMY WAS VICTORIOUS.

CHANDRA L. SINGH,

Appellee,

v.

ED KALLISH AND E. E. COOPER,

Defendants Below,

BANKERS STATE BANK, a Corp.,
Garnishee,

Appellant.

241 I.A. 326

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiff sued Kallish and Cooper and obtained a judgment for \$100.00 against them. Afterwards an execution was issued on the judgment and returned wholly unsatisfied. Thereupon plaintiff filed an affidavit for a garnishee summons which ran against the Bankers State Bank, a corporation. It was served by the bailiff on the first of June, 1925 and afterwards the Bank filed its verified answer wherein it set up that on June 1st, when it was served as garnishee, the defendant Kallish had on deposit in the bank \$1459.77; that six months prior to that time - January 3, 1925, Kallish was indebted to the bank in the sum of \$6000.00 and executed his note to the bank for that sum due "on demand after date"; that pursuant to the terms of the note, the garnishee "upon the service of the garnishee summons upon it, applied the sum of \$1459.77 upon the note"; that it had no other

241 I.A. 626

APPEAL FROM

UNIVERSITY COURT

OF CHICAGO

Appeal from

IT IS ORDERED THAT

the appeal be

dismissed with

costs to be paid

by the appellant.

Opinion filed May 3, 1938.

MR. JUSTICE O'CONNOR delivered the opinion

of the court.

Appellant was called to the bar and admitted

to practice law in this court in 1935.

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to practice law in this court in 1935.

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Appellant was called to the bar and admitted

to practice law in this court in 1935.

property or effects belonging to Kallish. Upon a trial before the court without a jury, there was a finding and judgment against the garnishee for \$100.00 and it appeals.

The record discloses that the note above mentioned contained the following provision "The undersigned agree that said bank may at any time before or after said note becomes due, at its discretion, apply in full or part payment hereon, any moneys or property in its possession on deposit or otherwise belonging to the undersigned." The evidence shows that after the bank was served with the garnishee summons on June 1, 1925, but on the same day the bank made a demand for payment upon Kallish and payment not having been made, it applied the money which Kallish had on deposit in the bank toward the payment of the \$5,000.00 note. This is all of the evidence in the record.

This court held in the cases of Obergfell v. Booth, 218 Ill. App. 492 and Paisley v. The Park Fireproof Storage Co., 232 Ill. App. 96, that where a judgment debtor had on deposit moneys in a bank and the notes there involved contained substantially the same provision as in the note above quoted, the bank upon service of a garnishee summons, had the right to thereafter apply the deposit toward the payment of the indebtedness of the judgment debtor to the bank. The record discloses that these cases were called to the attention of the trial judge. These cases are in point and the judgment should have been in favor of the garnishee.

It follows that the judgment of the Municipal Court of Chicago must be reversed.

JUDGMENT REVERSED.

SPENCER, P. J. AND TAYLOR, J. CONCUR.

304 - 30566

MABEL A. LILLY,

Appellant,

v.

ARCHIE F. LILLY,

Appellee.

247 T. A. C. 16

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this decree Mabel A. Lilly seeks to reverse a decree of divorce entered by the Circuit Court of Cook County dismissing her bill for separate maintenance and her bill for divorce filed against the defendant and awarding defendant a divorce on his crossbill.

The record is very much confused, but from a careful consideration of it, we are able to gather that on the 20th of August, 1920, Mabel A. Lilly filed her bill for separate maintenance against the defendant Archie F. Lilly; that he filed his answer to the bill and thereafter various orders were entered in that cause; that afterwards on March 20, 1923 she filed another suit against the defendant for an absolute divorce; that he filed his answer to that bill and an order was entered consolidating the separate maintenance and the divorce suits; that on April 23, 1924, the defendant filed his crossbill in the divorce suit, praying for a divorce on the ground of desertion and five days thereafter Mabel A. Lilly, complainant, filed her amended bill in the

241 T.A. 626

ALFRED T. HORN

DIRECTOR COURT,
COOK COUNTY,

MABEL A. LILLY,
Appellant,
v.
ARONIE P. LILLY,
Respondent.

Opinion filed May 5, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

By this decree Mabel A. Lilly seeks to reverse a
decree of divorce entered by the Circuit Court of Cook
County dismissing her bill for separate maintenance and
her bill for divorce filed against the defendant and award-
ing defendant a divorce on his crossbill.

The record is very much confused, but from a care-
ful examination of it, we are able to gather that on the
evening of August, 1930, Mabel A. Lilly filed her bill for
separate maintenance against the defendant Aronie P. Lilly;
that he filed his answer to the bill and thereafter various
orders were entered in that cause; that afterwards on March
30, 1933 she filed another suit against the defendant for
an absolute divorce; that he filed his answer to that bill
and an order was entered consolidating the separate mainten-
ance and the divorce suits; that on April 25, 1934, the defend-
ant filed his crossbill in the divorce suit, praying for a
divorce on the ground of desertion and five days thereafter
Mabel A. Lilly, complainant, filed her amended bill in the

divorce suit and that later the crossbill was amended.

The consolidated causes were set for hearing on December 24, 1924, they were reached for trial on January 5th following, when on motion of Mabel A. Lilly the cause was continued to January 19th and on the latter date it was again continued on motion of Mabel A. Lilly to January 26, 1925. When the cause was afterwards reached for trial, she filed a petition for a change of venue, which was allowed and the consolidated causes were transferred to Judge Wilson. On March 31, 1925, the consolidated causes having been on the trial calendar of Judge Wilson for a number of weeks, Mabel A. Lilly made a motion, supported by affidavits, to continue the cause to enable her to take depositions. So far as the record discloses this motion was never passed upon, and we gather from the briefs filed by both parties in this court that the consolidated causes came on for hearing before Judge Wilson on the 10th and 11th of April, 1925.

The decree recites that both parties were in court represented by their solicitors and after hearing the proofs oral and written, the court found that all of the material allegations of the amended crossbill were true and proved; that Mabel A. Lilly without any reasonable cause had wilfully deserted and abandoned Archie F. Lilly, her husband, and refused to live and cohabit with him since the 1st day of August, 1920. The court further found that a writ of ne exeat had been issued without reasonable cause and that it should be quashed. That Mabel A. Lilly had not sustained the allegations of her bill for separate maintenance, nor

divorce suit and that later the divorce was granted.

The consolidated causes were set for hearing

on December 24, 1934, they were heard for trial on

January 25th following, when on motion of Mabel A. Lilly

the cause was continued to January 19th and on the latter

date it was again continued on motion of Mabel A. Lilly to

January 26, 1935. When the cause was afterwards reached

for trial, she filed a petition for a change of venue,

which was allowed and the consolidated causes were transferred

to Judge Wilson. On March 21, 1935, the consolidated

causes having been on the trial calendar of Judge Wilson

for a number of weeks, Mabel A. Lilly made a motion, emp-

owered by affidavit, to continue the cause to enable her

to take depositions. So far as the record discloses this

motion was never passed upon, and no further from the

books filed by both parties in this court that the con-

solidated causes were on for hearing before Judge Wilson

on the 10th and 11th of April, 1935.

The record reflects that both parties were in court

represented by their solicitors and after hearing the proofs

oral and written, the court found that all of the material

allegations of the amended answer were true and proved;

that Mabel A. Lilly without any reasonable cause had wil-

fully deserted and abandoned Archie W. Lilly, her husband,

and refused to live and cohabit with him since the last day

of August, 1930. The court further found that a writ of

sequestration had been issued without reasonable cause and that it

should be dissolved. That Mabel A. Lilly had not sustained

the allegations of her bill for separate maintenance, nor

the allegations of her bill for divorce, and they were both dismissed for want of equity and a decree of divorce was awarded to cross-complainant as above stated on the ground of desertion. From this decree Mabel A. Lilly immediately prayed an appeal to this court which was allowed upon her filing a bond within twenty days and a certificate of evidence within forty days. This decree was entered April 15, 1925, and two days thereafter, Mabel A. Lilly, made a motion to set aside the decree and that the cause be set down for hearing at an early date. This motion was supported by the Affidavits of herself and of her solicitor, which set up, among other things, that on the hearing of the consolidated causes before the chancellor on April 10th and 11th she was not represented by counsel on account of his engagement before the Supreme Court at Washington. Her solicitor's affidavit is to the same effect. An order was entered placing the motion on the contested calendar for April 27, 1925. Three days before that time - April 24, 1925, Mabel A. Lilly filed her appeal bond and it was approved by the court thus perfecting her appeal from the decree of divorce entered on April 15, 1925. On May 4, 1925, the motion to vacate the decree was denied, but no appeal was prayed from that order.

The motion of Mabel A. Lilly and the affidavits in support thereof to vacate the decree, counsel for Archie F. Lilly, contend is not properly in the record, because not preserved in a certificate of evidence. This point is well taken, but we prefer to pass on the merits of the question and will, therefore, consider them as though they were properly before us.

the allegations of her bill for divorce, and they were both
dismissed for want of equity and a decree of divorce was
awarded to cross-complainant as above stated on the ground
of desertion. From this decree Mabel A. Lilly immediately
prayed an appeal to this court which was allowed upon her
filing a bond within twenty days and a certificate of evi-
dence within forty days. This decree was entered April 15,
1922, and two days thereafter, Mabel A. Lilly, made a mo-
tion to set aside the decree and that the cause be set down
for hearing at an early date. This motion was supported
by the affidavit of herself and of her solicitor, which
set up, among other things, that on the hearing of the
consolidated causes before the chancellor on April 10th
and 11th she was not represented by counsel on account
of his engagement before the Supreme Court at Washington.
Her solicitor's affidavit is to the same effect. An order
was entered placing the motion on the contested calendar
for April 27, 1922. Three days before that time - April
24, 1922, Mabel A. Lilly filed her appeal bond and it
was approved by the court thus perfecting her appeal from
the decree of divorce entered on April 15, 1922. On May
4, 1922, the motion to vacate the decree was denied, and
no appeal was noted from that order.

The motion of Mabel A. Lilly and the affidavit
in support thereof to vacate the decree, submitted for review
F. Lilly, contend is not properly in the record, because
not preserved in a certificate of evidence. This point is
well settled, but we prefer to pass on the merits of the ques-
tion and will, therefore, sustain them as shown that they
properly belong to.

Complaint is made by counsel for Mabel A. Lilly that the court erred in refusing to grant a continuance to her to enable her to take depositions of witnesses. This point is not preserved in the record, because although the record discloses that the motion was made, no ruling was ever obtained from the chancellor on the matter. Moreover, we think that the court would have been warranted in overruling the motion because there were numerous continuances granted at her request and some of them were not made until the case was actually reached on the call for trial. Motions of this character ought to be made before the day set for trial so that the court may be able to have causes on his trial calendar that can be heard and disposed of.

It is also urged by counsel for Mabel A. Lilly that the court erred in dismissing her bill for separate maintenance and her bill for divorce "on motion" and it is argued this practice is improper. The difficulty with this contention is that it is not borne out by the record. The decree entered by the chancellor shows that the consolidated causes came on for hearing; that all the parties were in court and represented by their counsel and that the court heard the proofs oral and written. The decree then makes a finding to the effect that Mabel A. Lilly has not sustained the allegations of her bills and the decree then states that "On motion of said solicitors for the cross-complainant, Archie F. Lilly, it is therefore, ordered, adjudged and decreed that the bill for separate maintenance" be dismissed for want of equity. This is the usual form and does not mean that the bill was merely dismissed on motion, but clearly shows that it was dismissed after a full hearing.

complaint is made by counsel for Abel A. Lilly that the court erred in refusing to grant a continuance to her to enable her to take depositions of witnesses. This point is not preserved in the record, because although the record discloses that the motion was made, no ruling was ever obtained from the chancellor on the matter. Nor, every, we think that the court would have been warranted in overruling the motion because there were numerous continuances granted at her request and none of them were not made until the case was actually reached on the call for trial. Motion of this character ought to be made before the day set for trial so that the court may be able to have witness on the trial calendar that can be heard and disposed of.

It is also urged by counsel for Abel A. Lilly that the court erred in dismissing her bill for separate maintenance and her bill for divorce "on motion" and it is argued this practice is improper. The difficulty with this contention is that it is not borne out by the record. The decree entered by the chancellor shows that the continuations caused some on for hearing; that all questions were in court and represented by their counsel and that the court heard the proofs oral and written. The decree then makes a finding to the effect that Abel A. Lilly has not sustained the allegations of her bills and the decree then states that "on motion of said wife for the reasons" complained, Abbie T. Lilly, it is therefore, ordered, adjudged and decreed that the bill for separate maintenance be dismissed for want of equity. This is the usual form and does not mean that the bill was merely dismissed on motion, but simply if shown that it was dismissed after a full hearing.

Complaint is made that the court erred in failing to vacate the decree of divorce entered on April 15, 1924, for the reason that the consolidated cause was heard in the absence of the solicitor for Mabel A. Lilly; that he was absent at the time at Washington, appearing before the United States Supreme Court. There are a number of reasons why this point has not been preserved. When this motion was made on April 17, 1925, the court continued the matter until April 27th and in place of waiting until the matter had been disposed of, she filed her appeal bond on the 24th of April, 1925, three days prior to the time the motion was set for hearing, thereby removing the cause to this court, her appeal bond having been approved by the court on that date. A second reason for holding that the point is not preserved, is that when the court did enter the order on May 4, 1925, denying the motion to vacate, no appeal was prayed from that order. And a third reason is that the decree entered on April 15th specifically finds that her solicitor was present at the trial of the case. The decree recites "This day comes the cross-complainant, Archie F. Lilly, by Kraft, Kraft & Erskine, his solicitors, and the cross-defendant, Mabel A. Lilly, by Edward M. Seymour, her solicitor." The decree is properly a part of the record and until some order is entered correcting or changing the decree, what is there recited must be taken as an absolute verity.

Complaint is also made that the decree is not warranted because the finding of fact to the effect that Mabel

Complaint is made that the court acted in failing to vacate the decree of divorce entered on April 18, 1934, for the reason that the consolidated cases were heard in the absence of the solicitor for Isabel A. Kelly; that he was absent at the time at Washington, appearing before the United States Supreme Court. There are a number of reasons why this point has not been preserved. When this motion was made on April 17, 1935, the court continued the matter until April 27th and in place of waiting until the matter had been disposed of, she filed her appeal bond on the 24th of April, 1935, three days prior to the time the motion was set for hearing, thereby removing the cause to this court, her appeal bond having been approved by the court on that date. A second reason for holding that the point is not preserved, is that when the court did enter the order on May 4, 1935, denying the motion to vacate, no appeal was prayed from that order. And a third reason is that the decree entered on April 18th specifically finds that her solicitor was present at the trial of the case. The decree recites "This day comes the cross-complainant, Archie T. Kelly, by Kelly, Kraft & Erickson, his solicitors, and the cross-defendant, Isabel A. Kelly, by Edward M. Seymour, her solicitor. The decree is properly a part of the record and until some order is entered correcting or changing the decree, what is shown recited must be taken as an absolute verity.

Complaint is also made that the decree is not warranted because the finding of fact to the effect that Isabel

A. Lilly was guilty which is the basis of the decree is insufficient to support it in the absence of evidence, which is not preserved in the record and that there is no allegation in the cross-bill that the cross-complainant was a resident of this state for the period required by the statute. The decree finds that on October 1, 1920, "Mabel A. Lilly wilfully and without any reasonable cause therefor, deserted and abandoned the said cross-complainant, Archie F. Lilly and wholly refused to live and cohabit with him any longer as husband and wife, and from thence hitherto, for a space of over two years immediately preceding and up to the filing of the said amended cross-bill has continuously absented herself from him and refused to return to live with him as husband and wife, and still does, without any fault on the part of the said cross complainant." This finding was sufficient. Neely v. Neely, 223 Ill. App. 188. Nor is there any merit in the other point, because she alleged in her bill for divorce that she "is and for more than a year last past, continuously, immediately preceding the filing of this bill of complaint has been an actual resident of the County of Cook and State of Illinois." After the filing of her bill for separate maintenance and after the bill for divorce, she invoked the aid of the court. Numerous orders were entered on her motion, including the issuance of a writ of ne exeat, and, therefore, she will not now be permitted to contend that the court had no jurisdiction. Stewart v. Stewart, 231 Ill. App. 159 and cases there cited. Moreover, even if the defendant and cross-complainant Archie F. Lilly

4. Lilly was guilty which is the basis of the divorce is immaterial to support it in the absence of evidence which is not presented in the record and that there is no allegation in the cross-bill that the cross-complainant was a resident of this state for the period required by the statute. The divorce finds that on October 1, 1930, "Mabel A. Lilly withily and without any reasonable cause whatever, deserted and abandoned the said cross-complainant, Archie A. T. Lilly and withily refused to live and cohabit with him any longer as husband and wife, and from thence hitherto for a space of over two years immediately preceding and up to the filing of the said amended cross-bill has continuously abandoned herself from him and refused to return to live with him as husband and wife, and still does, without any fault on the part of the said cross-complainant." This finding was sufficient. Mabel v. Lilly, 232 Ill. App. 109, 1930, 102 N.E. 2d 109. There are many cases in the other points, because the alleged is her bill for divorce that she "is and for more than a year last past, continuously, immediately preceding the filing of this bill of complaint has been an actual resident of the County of Cook and State of Illinois." After the filing of her bill for separate maintenance and after the bill for divorce, she invoked the aid of the court. Numerous orders were entered on her motion, including the issuance of a writ of habeas corpus, and, therefore, she will not now be permitted to contend that the court had no jurisdiction. Stewart v. Stewart, 231 Ill. App. 109 and cases there cited. Moreover, even if the defendant and cross-complainant Archie T. Lilly

was not a resident of this state (and this is not a fact), the court under the circumstances would be warranted in awarding him a divorce. Stewart v. Stewart, supra and authorities there cited.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

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475

JAMES B. SOTOS, et al,
Appellees,

v.

JOHN KRINGAS, ET AL,
Appellants.

241 I.A. 627

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendants to recover \$231.72, claimed to be due for seats sold and delivered by plaintiffs to the defendants. The case was tried before the court without a jury and there was a finding and a judgment in plaintiffs favor for the amount of their claim and the defendants appeal.

Plaintiffs in their statement of claim alleged that there was due them from the defendant \$231.72 for goods, wares and merchandise furnished by plaintiffs to the defendants, at the latter's special request. Plaintiffs also alleged that there was an account stated between the parties. The defendants filed an affidavit of merits in which they set up that they never ordered the merchandise in question; that they never authorized any one to purchase the merchandise; that the plaintiffs did not furnish the merchandise at defendants' request or at the request of any one authorized by them. The defendants admitted that they refused to pay the \$231.72, claimed by plaintiffs because they did not owe it, and there was a

241 I.A. 627

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

JAMES M. POTTER, et al.,
Appellants,
vs.
JOHN KRIMMEL, et al.,
Appellees.

Opinion filed May 5, 1928.

MR. JUSTICE O'CONNOR delivered the opinion of

the court.

Plaintiffs brought suit against the defendants to recover \$231.75, claimed to be due for goods sold and delivered by plaintiffs to the defendants. The case was tried before the court without jury and there was a finding and a judgment in plaintiffs favor for the return of their claim and the defendants appeal.

Plaintiffs in their statement of claim alleged

that there was due from the defendant \$231.75 for goods, wares and merchandise furnished by plaintiffs to the defendants, at the latter's special request. Plaintiffs also alleged that there was an account stated between the parties. The defendants filed a statement of facts in which they set up that they never ordered the merchandise in question; that they never authorized any one to purchase the merchandise; that the plaintiffs did not furnish the merchandise at defendants' request or at the request of any one authorized by them. The defendants admitted that they returned to pay the \$231.75, claimed by plaintiffs because they did not pay it, and there was a

denial that there was an account stated between the parties.

It appears that the defendants conducted two stores, one at 67th street and Stoney Island avenue and the other at 63rd street and Dorchester avenue where they sold meats and groceries at retail; that they had employed at the 67th street store, one Harry Vassius, for a short period of time - about two or three weeks. He testified for the plaintiffs to the effect that he had charge of the meat department of the store on 67th street and that at times he ordered meats, including the meats involved in the suit and that he afterwards sold them to the defendants' customers in the regular course of business. The evidence further shows that plaintiffs' claim was based upon seven deliveries made on seven different days and that on three of the deliveries being made, the witness Vassius gave the person delivering the meats a receipt, showing that he had them. Apparently these receipts were produced on the trial but they are not in the record. The testimony on behalf of the defendants was to the effect that they themselves bought all the meats sold by them in their store and that they had not authorized any one of their employees to purchase meats for them, and that they had not authorized Vassius to do so. Their evidence further tends to show that they employed Vassius for a short time, about two weeks, as a grocery clerk, and that they knew nothing about whether the meats had been delivered at the store by the plaintiffs. While the evidence does not show who if any one, signed for the other four deliveries of meats, nor the quantity or price of the meats that were delivered for which the three tickets or receipts were given as above mentioned, the evidence in

denial that there was an account stated between the parties.

It appears that the defendant conducted two

stores, one at 67th street and Broadway Island Avenue and the other at 67th street and Rochester Avenue where they sold meats and groceries at retail; that they had employed at the 67th street store, one Harry Vassian, for a short period of time - about two or three weeks. He testified for the plaintiff to the effect that he had charge of the meat department of the store on 67th street and that at

times he ordered meats, including tomatoes involved in the suit and that he afterwards sold them to the defendant; customers in the regular course of business. The evidence further shows that plaintiff's claim was based upon seven deliveries made on seven different days and that on three of the deliveries being made, the witness Vassian gave the person delivering the meats a receipt, showing that he had them. Apparently these receipts were produced on the trial

but they are not in the record. The testimony on behalf of the defendant was to the effect that they themselves bought

all the meats sold by them in their store and that they had not authorized any one of their employees to purchase meats for them, and that they had not authorized Vassian to do so. Their evidence further tends to show that they employed Vassian for a short time, about two weeks, as a grocery clerk, and that they knew nothing about whether the meats had been delivered at the store by the plaintiff. While the evidence does not show who it was one, signed for the other two deliveries of meats, nor the quantity or price of the meats that were delivered for which the three receipts or receipts were given as above mentioned, the evidence in

our opinion does show that there were seven deliveries, and that they were of the value of the amount the plaintiffs are here suing for. Moreover, there is no denial by the defendants in their affidavit of merits of the allegation that plaintiffs had delivered to the defendants meats of the value of \$321.72. The defendants denial consists in the assertion that the meats were not delivered on the authority of the defendants so that upon a careful consideration of the entire record, it appears that plaintiffs delivered to the defendants meats for which plaintiffs made a charge of \$321.72, and that the defendants received and sold those meats in the regular course of their business and have not paid plaintiffs. In these circumstances, we would not be warranted in reversing the judgment, although Vassius was not authorized to buy or receive the meats. The defendants having received the meats in question and having sold them, they ought, in equity and good conscience to pay for them.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

our opinion that there were never delivered, and that they were of the value of the amount the plaintiff are here suing for. Moreover, there is no denial by the defendant in their affidavit of notice of the allegation that plaintiff had delivered to the defendant waste of the value of \$221.75. The defendant denied receipt in the assertion that the waste were not delivered on the authority of the defendant so that upon a careful consideration of the entire record, it appears that plaintiff delivered to the defendant waste for which plaintiff made a charge of \$221.75, and that the defendant received and sold those waste in the regular course of their business and have not paid plaintiff. In those circumstances, we could not be warranted in reversing the judgment, although plaintiff was not authorized to buy or receive the waste. The defendant having received the waste in question and having sold them, they ought, in equity and good conscience to pay for them.

The judgment of the Municipal Court of Chicago

is affirmed.

ATTORNEYS.

JOHN J. LEE, J. L. LEE, J. L. LEE, J. L. LEE.

C. P. LOVE & CO., a corp.,
Appellee,

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant.

247 F. 2d 627

APPEAL FROM.

MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought a fourth class contract case
in the Municipal Court of Chicago against the defendant to
recover damages alleged to have been sustained through the
failure of the railroad company to deliver a carload of
apples within a reasonable time as a result of which plain-
tiff claimed it was damaged. Defendant filed an affidavit
of merits which on motion of plaintiff was stricken, the
defendant elected to stand by its affidavit of merits;
thereupon the court heard the evidence and assessed plain-
tiff's damages at \$395.26 and the defendant appeals.

Plaintiff in its statement of claim alleged that the
defendant was a common carrier; that plaintiff delivered to
it one carload of apples at Chicago for transportation to
Philadelphia; that the apples were in good, sound, marketable
and shipping condition; that the defendant failed to deliver
the apples within a reasonable time and in good condition,
but on the contrary, delayed the shipment beyond a reason-
able time; that the apples had deteriorated and the market
had declined, as a result of which plaintiff was damaged.

241 I.A. 627

APPEAL FROM

MUNICIPAL COURT

CHICAGO, ILL.

G. V. LOVE & CO., INC.

Plaintiff

KENTUCKY RAILROAD COMPANY

Defendant

Opinion filed May 5, 1936.

MR. JUSTICE O'CONNOR delivered the opinion of

the court. Plaintiff brought a fourth class certified mail in the Municipal Court of Chicago against the defendant to recover damages alleged to have been sustained through the failure of the railroad company to deliver a certain of apples within a reasonable time as a result of which plaintiff claimed it was damaged. Defendant filed an answer of denial which an action of plaintiff was returned, the defendant moved to stand by its answer of denial; thereupon the court heard the evidence and accepted plaintiff's answer as true, and the defendant appealed.

Plaintiff in its statement of claim alleged that the defendant was a common carrier; that plaintiff delivered to it one carload of apples at Chicago for transportation to Philadelphia; that the apples were in good, sound, marketable and shipping condition; that the defendant failed to deliver the apples within a reasonable time and in good condition; but on the contrary, delayed the shipment beyond a reasonable time; that the apples had deteriorated and the market had declined, as a result of which plaintiff was damaged.

The defendant in its affidavit of merits set up what it contends are three separate defenses. The first defense was "that the shipment described in plaintiff's statement of claim was the subject of a written contract * * "; that plaintiff has not alleged the material portions of said written contract and defendant reserves the right to object to the sufficiency of said statement of claim and to the amendment of said statement of claim after the contract or statutory limitations have lapsed; that the defendant complied with the said written contract but plaintiff did not." A mere reading of these allegations is sufficient to show that it constitutes no defense under any system of pleading. In the first place, there was no amendment to plaintiff's statement of claim. The allegation that plaintiff had not set forth the material portions of the written contract, and therefore, the defendant reserves the right to object to the sufficiency of the statement of claim is not warranted by any system of pleading. If the statement of claim was insufficient, the defendant should have made a motion to strike, which is equivalent to a demurrer. The other allegation in this alleged defense is not intelligible.

The second defense sought to be made by the defendant set up that the "freight was loaded and counted by plaintiff and not by defendant, and, therefore, defendant does not know whether or not said freight was in good, sound, marketable and shipping condition when it was delivered to the defendant, and defendant does not admit that said freight was in good, sound, marketable and shipping condition when delivered to it, but insists upon strict proof thereof in open court." It is

The defendant in its affidavit of merits and up what it contends are three separate defenses. The first defense was "that the shipment described in plaintiff's statement of claim was the subject of a written contract" * * * that plaintiff has not alleged the material portions of said written contract and defendant reserves the right to object to the sufficiency of said statement of claim and to the amendment of said statement of claim after the close of the evidence; that the defendant's statutory limitations have lapsed; that the defendant complied with the said written contract but plaintiff did not. A mere recital of these allegations is sufficient to show that it constitutes no defense under any system of pleading. In the first place, there was no amendment to plaintiff's statement of claim. The allegation that plaintiff had not set forth the material portions of the written contract, and therefore, the defendant reserves the right to object to the sufficiency of the statement of claim is not warranted by any system of pleading. If the statement of claim was insufficient, the defendant should have made a motion to strike, which is equivalent to a demurrer. The other allegation in this alleged defense is not intelligible.

The second defense sought to be made by the defendant and set up that the freight was loaded and consigned by plaintiff and not by defendant, and, therefore, defendant does not know whether or not said freight was in good, sound, marketable and shipping condition when it was delivered to the defendant, and defendant does not admit that said freight was in good, sound, marketable and shipping condition when delivered to it, but insists upon strict proof in open court. It is

obvious that this was no complete defense, it only required plaintiff to prove the number of barrels of apples delivered and that they were in good condition at that time.

The defendant in its third defense denied "that there was a duty on its behalf to transport and deliver said freight within a reasonable time and in like condition as received by defendant, but says that it did actually deliver said shipment in a reasonable time and in like condition as received." We think this constitutes a good defense to the whole of plaintiff's claim. Plaintiff alleged that the defendant had unnecessarily delayed the shipment of the apples and that they were in good condition when delivered to the defendant, but in bad condition when the defendant delivered the apples in Philadelphia. The defense interposed clearly joins issue on these allegations and the court erred in striking defendant's affidavit. American Hard Rubber Co. v. Howe, 280 Ill. 431. Since the case must be remanded for a trial, we think we ought to say that if it appears that a bill of lading was issued, and we presume there was one, it must be produced or its absence accounted for. Plaintiff's statement is sufficient to warrant it proving, if it can, on the trial that the contract between the parties was evidenced by a written document - a bill of lading.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

obtains that this was no complete defense, it only required
plaintiff to prove the number of barrels of apples delivered
and that they were in good condition at that time.

The defendant in its third defense denied that
there was a duty on its behalf to transport and deliver
said apples within a reasonable time and in like condition
as received by defendant, but says that it did actually
deliver said shipment in a reasonable time and in like con-
dition as received. We think this constitutes a good defense
to the claim of plaintiff's claim. Plaintiff alleged that
the defendant had unnecessarily delayed the shipment of the
apples and that they were in good condition when delivered
to the defendant, but in bad condition when the defendant
delivered the apples in Philadelphia. The defense inter-
posed clearly joins issue on these allegations and the court
erred in striking defendant's affidavit. Amesbury v. Hays
201 V. 200 Ill. 431. Since the case must be remanded
for a trial, we think we ought to say that if it appears
that a bill of lading was issued, and we presume there was
one, it must be produced by its absence accounted for. This
bill of lading is sufficient to warrant it provided it is
and, on the trial that the contract between the parties was
evidenced by a written document - a bill of lading.

The judgment of the Municipal Court of Chicago is

reversed and the case remanded.

REVEREND AND HONORABLE

THOMAS J. AND TAYLOR, J. JUDGE.

H. ELLIS,

Appellee,

v.

EDMUND A. MURPHY,

Appellant.

241 I.A. 627

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiff brought suit against the defendant to recover \$99.00 claimed to be due on account of defendant occupying a part of plaintiff's premises at \$3.00 per day from the first day of February until the 5th of March, 1925. The defendant filed an affidavit of merits admitting that the parties executed a written agreement between them on the 5th of February, 1925, by the provisions of which the defendant was to occupy a certain store room in premises belonging to plaintiff at the rate of \$3.00 per day, and that he occupied such premises from the first of February to the 18th of February when he vacated them; that he vacated the premises on account of plaintiff removing a large window which rendered them uninhabitable on account of the severe cold weather; that in an endeavor to render the premises tenantable after the removal of the window, defendant purchased a tarpaulin for \$20.00, which he hung across the open space where the window had been removed, but this did not change the condition. The defendant also filed a setoff, claiming the \$20.00.

241 I.A. 627

APPEAL FROM

CRIMINAL COURT

OF CHICAGO

H. ELLIS

Appellant

v.

EDWARD A. MURPHY

Appellee

Opinion filed May 5, 1936

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover \$30.00 claimed to be due on account of defendant occupying a part of plaintiff's premises at \$2.00 per day from the first day of February until the 18th of March, 1935. The defendant filed an affidavit of merit admitting that the parties executed a written agreement between them on the 8th of February, 1935, by the provisions of which the defendant was to occupy a certain store room in premises belonging to plaintiff at the rate of \$2.00 per day, and that he occupied such premises from the first of February to the 18th of February when he vacated them; that he vacated the premises on account of plaintiff removing a large window which rendered them unsuitable on account of the severe cold weather; that in an endeavor to render the premises tenable after the removal of the window, defendant purchased a tarpaulin for \$30.00, which he hung across the open space where the window had been removed, but this did not change the condition. The defendant also filed a recital, claiming the \$30.00

which he expended for the tarpaulin and further claiming \$60.00 being the value of a linoleum which he left upon the floor of the room in question and which plaintiff or his agents destroyed in endeavoring to remove it from the floor. In this setoff defendant admitted that he owed \$48.00 by reason of his occupancy of the room which he ~~con-~~tended should be deducted from the \$80.00 which he claimed plaintiff owed him, leaving a balance due from plaintiff to defendant of \$32.00. The case was tried before a court without a jury and there was a finding in favor of plaintiff for \$90.00 and against the defendant on his setoff. Judgment was entered on the finding and the defendant appeals.

The record discloses that defendant had been a tenant occupying the room in question under a written lease which expired the 31st of January, 1925; that about that time defendant was constructing a new building of his own across the street into which he expected to move upon its completion; that plaintiff was desirous of remodeling the building in which the defendant occupied the room in question and on the 5th of February a written agreement was entered into between the parties, whereby it was agreed that plaintiff might proceed with the alterations of his building as he saw fit; that defendant was to continue to occupy the room in question and to pay \$3.00 per day during the time he so occupied it. It was further agreed that the defendant was to vacate the premises on the first of March, 1925. There was a further provision that defendant would make no claim for any damages on account of the alterations or changes being made by plaintiff, either in the interior

which he expended for the furniture and further claiming \$60.00 being the value of a linoleum which he laid upon the floor of the room in question and which plaintiff or his agents destroyed in endeavoring to remove it from the

floor. In this case defendant admitted that he owed \$48.00 by reason of his occupancy of the room which he rented should be deducted from the \$60.00 which he claimed plaintiff owed him, leaving a balance due from plaintiff to defendant of \$12.00. The case was tried before a court without a jury and there was a finding in favor of plaintiff for \$60.00 and against the defendant on his counterclaim. Judgment was entered on the finding and the defendant

appeals.

The record discloses that defendant had been a tenant occupying the room in question under a written lease which expired the first of January, 1922; that about that time defendant was constructing a new building of his own across the street into which he expected to move upon its completion; that plaintiff was desirous of remodeling the building in which the defendant occupied the room in question and on the 25th of February a written agreement was entered into between the parties, whereby it was agreed that plaintiff might proceed with the alterations of his building as he saw fit; that defendant was to continue to occupy the room in question and to pay \$5.00 per day during the time he so occupied it. It was further agreed that the defendant was to vacate the premises on the first of March, 1922. There was a further provision that defendant would make no claim for any damages on account of the alterations or changes which might be made in the building.

or exterior of the building. Plaintiff offered evidence to the effect that the defendant vacated the premises on the evening of March 5th, while the defendant offered evidence tending to show that he had vacated the premises on the 17th of February; that he was compelled to vacate the premises at that time on account of the plaintiff removing a large window which rendered the room untenable on account of the severe cold weather; that on the 17th or 18th of February he bought a tarpaulin at the cost of \$20.00 which he had placed over the space where the window had been removed in an endeavor to render the room habitable, but that he never thereafter moved back in any of his furniture into the place because the room was too cold. He also offered evidence tending to show that sometime later he endeavored to remove the linoleum on the floor which had been placed there by him several months before, but was unable to do so on account of the repairs then being made by plaintiff. Defendant also offered evidence tending to show that the linoleum was torn by plaintiff in removing it from the premises. But we think it clear that the evidence failed to show that plaintiff or his representative had torn the linoleum or had removed it. The defendant's evidence further tended to show that after the 17th of February he and some of his employees stayed around the place and would go in occasionally to answer the telephone calls.

The evidence as to when the defendant removed his furniture from the premises is in direct conflict. Plaintiff's witnesses testifying that some of it remained until the evening of the 5th of March when the defendant vacated

on exterior of the building. Plaintiff offered evidence to the effect that the defendant entered the premises on the evening of March 5th, while the defendant offered evidence tending to show that he had vacated the premises on the 17th of February, that he was compelled to vacate the premises at that time on account of the plaintiff removing a large window which rendered the room untenable on account of the severe cold weather; that on the 17th or 18th of February he bought a tarpaulin at the cost of \$20.00 which he had placed over the space where the window had been removed in an endeavor to render the room habitable, but that he never thereafter moved back in any of his furniture into the place because the room was too cold. He also offered evidence tending to show that sometime later he endeavored to remove the tarpaulin on the floor which had been placed there by him several months before, but was unable to do so on account of the repairs then being made by plaintiff. Defendant also offered evidence tending to show that the tarpaulin was torn by plaintiff in removing it from the premises. But we think it clear that the evidence failed to show that plaintiff or his representative ever had torn the tarpaulin or had removed it. The defendant's evidence further tended to show that after the 17th of February he and some of his employees stayed around the place and would go in occasionally to answer the telephone.

The evidence as to when the defendant removed the furniture from the premises is in direct conflict. Plaintiff's witnesses testifying that some of it remained until the evening of the 5th of March when the defendant vacated

the premises and turned in the key, while as stated, the defendant's evidence was to the effect that he removed it on the evening of the 16th of February. Of course, defendant's business was interfered with on account of the alterations being made by plaintiff and it is clear from the written agreement entered into between the parties that this was contemplated because it provided that plaintiff might make alterations both in the interior and exterior.

We have carefully considered all the evidence in the record and are unable to say that the finding of the trial judge who saw and heard the witnesses is against the manifest weight of the evidence. Under the law in view of the evidence, we are not warranted in disturbing the judgment of the Municipal Court of Chicago, and therefore, it is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

the premises and turned in the key. While he stated, the
defendant's evidence was to the effect that he removed it
on the evening of the 18th of February. Of course, de-
fendant's business was interfered with on account of the
disturbance being made by plaintiff and it is clear from
the written agreement entered into between the parties
that this was contemplated because it provided that plain-
tiff might make alterations both in the interior and

exterior.

We have carefully considered all the evidence
in the record and are unable to say that the finding of the
trial judge who saw and heard the witnesses is against
the weight of the evidence. Under the law in
view of the evidence, we are not warranted in disturbing
the judgment of the Municipal Court of Chicago, and there-
fore, it is affirmed.

ATTORNEYS.

ROBERT L. TAYLOR, J. CONOUR.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel ANTON NAUSEDA,

Appellee,

v.

WILLIAM E. DEVER, Mayor, et al,

Appellants.)

241 I.A. 627

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Anton Nauseda filed his petition in the Superior Court of Cook County, praying that a writ of mandamus issue to compel the city officials to issue to him a retail beverage dealer's license. Respondents filed a demurrer which was sustained. Thereafter the petitioner, by leave of court, filed his amended petition to which the respondents demurred. Their demurrer was overruled and they filed an answer. Afterwards, by agreement, a jury was waived and the cause tried before the court and at the conclusion of the hearing, the court entered judgment awarding the writ.

It appears from the evidence that on January 21, 1925, the petitioner made an application to the city officials for a retail beverage dealer's license. The Mayor of Chicago on a report made by other officials to him denied the application. The evidence further tends to show that the petitioner in October, 1923, was operating a soft drink parlor under a license issued to him by the proper city officials and that sometime during that month the Mayor revoked his license on

341 I.A. 627

PEOPLE OF THE STATE OF ILLINOIS,
EX REL ANTHON HANSEN, JR.

Appellee,

TRIAL FROM

SUPERIOR COURT,

COOK COUNTY.

WILLIAM E. HUBER, Mayor, et al.,
Appellants.

Opinion filed May 2, 1936.

HUBER & HANSEN delivered the opinion

of the court.

HANSEN & HUBER filed his petition in the Superior Court of Cook County, praying that a writ of mandamus issue to compel the city officials to issue to him a retail beverage dealer's license. Respondents filed a demurrer which was sustained. Thereafter the petitioner, by leave of court, filed his amended petition in which the respondents demurred. Their demurrer was overruled and they filed an answer. Afterward, by agreement, a jury was waived and the cause tried before the court and at the conclusion of the hearing, the court entered judgment granting the writ.

It appears from the evidence that on January 21,

1935, the petitioner made an application to the city officials for a retail beverage dealer's license. The Mayor of Chicago on a report made by other officials to him denied the application. The evidence further tends to show that the petitioner in October, 1935, was operating a soft drink parlor under a license issued to him by the proper city officials and that sometime during that month the Mayor revoked his license on

report of certain police officers, and thereafter the petitioner, who was the owner of the premises wherein he conducted his business ceased to conduct the soft drink parlor and went into the dry goods business at the same place. This business seems not to have been successful and in January, 1925, some fourteen or fifteen months after his license had been revoked, he decided to again go into the soft drink business and made an application for a license as above stated.

The petitioner testified in his own behalf that he owned the premises at No. 1024 Center street, Chicago and resided therewith his family; that he had been a resident of Chicago for twenty-five years and a citizen of the United States for about eight years; that he had never been arrested on a charge of disorderly conduct or for any other misdemeanor; that he had made an application on January 21, 1925, for a license and that his application had been denied. He further testified that he was in the dry goods business at No. 1024 Center Street, which he had conducted since about October, 1923, but became bankrupt in conducting that business; that prior to October, 1923, he was engaged in business at the same address, serving soft drinks and lunches and did considerable business, his place being located near a number of factories; that the police had searched his place about eighteen times during the period of two weeks prior to the time his license had been revoked but at no time did they find any liquor in his place; that on October 21, 1923, police officers again came into his place of business; that he was sitting on a chair near the end of the bar; that a glass was on the bar some distance from him and one of the

report of certain police officers, and thereafter the petitioner, who was the owner of the premises wherein he conducted his business ceased to conduct the self drink parties and went into the dry goods business at the same place. This business seems not to have been successful and in January, 1935, some fourteen or fifteen months after his license had been revoked, he decided to again go into the self drink business and made an application for a license as above stated.

The petitioner testified in his own behalf that he owned the premises at No. 1034 Center Street, Chicago and resided therein with his family; that he had been a resident of Chicago for twenty-five years and a citizen of the United States for about eight years; that he had never been arrested on a charge of disorderly conduct or for any other misdemeanor; that he had made an application on January 31, 1935, for a license and that his application had been denied. He further testified that he was in the dry goods business at No. 1034 Center Street, which he had conducted since about October, 1932, but because bankrupt in conducting that business; that prior to October, 1932, he was engaged in business at the same address, selling self drink and lunches and his consideration business, his place being located near a number of footpaths; that the police had searched his place about eighteen times during the period of two weeks prior to the time his license had been revoked but at no time did they find any liquor in his place; that on October 31, 1935, police officers again came into his place at business; that he was sitting on a chair near the end of the bar; that there was on the bar some distance from him and one of the

officers took it from the bar and said "that is a booze smell, and asked the other officer 'any booze smell' and he said 'No'"; that at that time there were no customers in the place but one man was sitting some distance from the bar; that he did not dump the contents of the glass into the water behind the bar when the officers came in; that he sold lunches, root beer, candy and near-beer; that he served lunches to forty or fifty people a day at noon and evenings, to persons who worked in nearby factories.

For the respondents, William P. Kennedy, a lieutenant of police, testified that he was assigned to the office of the Chief of Police and on the 31st of October, 1923, he went to the petitioner's place of business with other officers and that he had gone there five or six times within two or three weeks prior to that time and made a search of the premises, but at no time had he found any liquor; that on October 31st he stopped the automobile in which he and the other officers were riding, - went to the front door and another officer to the side door, the premises being located on the street corner; that petitioner's wife went in the side door hurriedly, closed the door and bolted it so the officers could not enter at that place; that the witness went in the front door, rushed toward the bar and looked over the top of it; that the petitioner's wife "hollered" to her husband who was sitting on a stool near the end of the bar, and when she did so, petitioner rushed over and grabbed a glass that was on the top of the bar and dashed something in the water; that the witness smelled of the glass and it smelled of whiskey; that he did not arrest petitioner, but recommended to his superior officer that

officers took it from the way and said "that is a house
small, and asked the other officer 'any house small' and
he said 'No!'; that at that time there were no customers in
the place but one man was sitting some distance from the
bar; that he did not dump the contents of the glass into the
water behind the bar when the officers came in; that he
saw lunches, root beer, candy and beer-beer; that he
served lunches for forty or fifty people a day at noon and
evenings, to persons who worked in nearby factories.

For the respondents, William E. Kennedy, a witness
and ex police, testified that he was assigned to the station of
the Chief of Police and on the first of October, 1935, he went
to the petitioner's place of business with other officers
and that he had gone there five or six times within two or
three weeks prior to that time and made a search of the
premises, but at no time had he found any liquor; that on
October 21st he stopped the automobile in which he and the
other officers were riding, - went to the front door and
another officer to the side door, the premises being located
on the street corner; that petitioner's wife went in the
side door hurriedly, closed the door and boiled it so the
officers would not enter at that place; that the witness
went to the front door, knocked toward the bar and looked
over the top of it; that the petitioner's wife "battered"
to her husband who was sitting on a stool near the end of
the bar, and when she did so, petitioner rushed over and
grabbed a glass that was on the top of the bar and dashed
something in the water; that the witness smiled at the
glass and it smiled at whiskey; that he did not expect
petitioner, but recommended to his superior officer that

petitioner's license be revoked, which was accordingly done; that a week prior to the time in question he made frequent trips to the place and other soft drink parlors; that on each of these occasions he searched the premises, but never found any liquor at any time; that he had received complaints from citizens in the neighborhood by way of anonymous letters. The other officer who was in the squad, testified that he endeavored to go into the side entrance, but that petitioner's wife ran in ahead of him and bolted the door so that he could not enter and that then he went in the front door after officer Kennedy. It was then agreed that his testimony would be substantially the same as that of officer Kennedy. He further testified that he had visited this place together with other soft drink parlors for two or three weeks prior to the time in question and had helped search it, but found no liquor at any time; that he knew nothing about the petitioner's character or reputation; that he never received any complaints about petitioner being an undesirable character. This is all the evidence in the record.

No brief has been filed on behalf of the petitioner in this court, but the city officials have filed a brief, but in no way do they discuss the evidence in the record, their argument being confined to the law governing the issuance of writs of mandamus in such cases. Although the law on this subject is well established, we think it right and proper that the points on this question be made and authorities cited and that there be some short discussion of them. But this is of little or no assistance to the court in arriving at a correct decision of the case unless it is pointed out

petitioner's license to testify, which was accordingly done;
that a week prior to the time in question he made frequent
trips to the place and other well known places; that on
each of these occasions he received the premium, but never
found any liquor at any time; that he had received complaints
from citizens in the neighborhood by way of anonymous letters.
The other officer who was in the squad, testified that he en-
deavored to go into the side entrance, but that petitioner's
wife ran in ahead of him and locked the door so that he could
not enter and that then he went in the front door where
officer Kennedy. It was then agreed that his testimony would
be substantially the same as that of officer Kennedy. He
further testified that he had visited this place together
with other well known persons for two or three weeks prior
to the time in question and had helped master it, but found
no liquor at any time; that he knew nothing about the peti-
tioner's character or reputation; that he never received
any complaints about petitioner being an undesirable character.
This is all the evidence in the record.
No brief has been filed on behalf of the petitioner
in this court, but the city officials have filed a brief, but
in no way do they discuss the evidence in the record, their
argument being confined to the law governing the issuance of
writs of mandamus in such cases. Although the law on this
subject is well established, we think it right and proper
that the points on this question be made and authorities
cited and that there be some short discussion of them. But
this is of little or no assistance to the court in arriving
at a correct decision of the case unless it is pointed out

in the argument how the law applies to the particular case before us in view of the evidence in the record. There is not a word of argument on the merits in this case in the brief filed. It is not pointed out why the mayor was warranted in revoking the license, nor is there any argument that the trial judge was wrong in awarding the writ and while it is not the duty of the reviewing court to search the record to find error, if there be error, to reverse a judgment of a trial court, although we may do so under the law in affirming a judgment, yet in this case we prefer to pass upon the merits, and therefore, have above set forth rather fully all of the evidence in the record. Upon a consideration of the evidence, we think it appears that the most that can be said is that a vague suspicion arises that the petitioner was selling at retail whiskey contrary to law, and while in the case before us it is not necessary that the evidence in the record should be of that character that would warrant a conviction of the petitioner, in case a criminal charge was placed against him, nor does the law require that it should be of the character required in a case where a fine was to be imposed for the violation of some ordinance or law, yet we think the evidence is such that we would not be warranted in over-turning the judgment of the trial court who saw and heard the witnesses testify, observed their demeanor on the stand, and was, therefore,

in a much better position to determine the facts in the case than are we in a court of review. In these circumstances, we think we would not be warranted in disturbing the judgment and, therefore, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

in the argument how the law applies to the particular case before us in view of the evidence in the record. There is not a word of argument on the merits in this case in the brief filed. It is not pointed out why the mayor was wrong in revoking the license, nor is there any argument that the trial judge was wrong in awarding the writ and while it is not the duty of the reviewing court to search the record to find error, if there be error, to reverse a judgment of a trial court, although we may do so under the law in affirming a judgment, yet in this case we prefer to pass upon the merits, and therefore, have above set forth whether fully all of the evidence in the record. Upon a consideration of the evidence, we think it appears that the most that can be said is that a vague suspicion arises that the petitioner was selling at retail whiskey contrary to law, and while in the case before us it is not necessary that the evidence in the record should be of that character that would warrant a conviction of the petitioner, in case a criminal charge was placed against him, nor does the law require that it should be of the character required in a case where a fine was to be imposed for the violation of some ordinance or law, yet we think the evidence is such that we would not be warranted in over-turning the judgment of the trial court who saw and heard the witnesses testify, observed their demeanor on the stand, and was, therefore, in a much better position to determine the facts in the case than are we in a court of review. In these circumstances, we think we would not be warranted in disturbing the judgment and, therefore, the judgment of the Superior Court of Cook County is affirmed.

THOMSON, P. J. AND TAYLOR, J. CONCUR.

401 - 30864

LOUIS H. ANNAPOL,

Appellee,

v.

YELLOW CAB COMPANY,
a corp.,

Appellant.)

241 I.A. 627

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Plaintiff brought suit against the defendant, claiming \$150.00 on account of his automobile being struck and damaged by one of defendant company's cabs through the negligent operation of the cab. The defendant filed an affidavit of merits in which it denied that it was guilty of carelessness or wrecklessness in the operation of the cab as alleged, but on the contrary, averred that the damages claimed by plaintiff resulted from his own carelessness in operating his automobile. The defendant further in its affidavit of merits "Denies that the defendant herein owned, operated maintained or controlled the automobile or taxicab that figured in this collision." The case was tried before the court without a jury and there was a finding in plaintiff's favor for \$99.60 and the defendant appeals.

Plaintiff testified that about mid-night he was driving his Buick automobile east in Van Buren street and when he came to the west side of Michigan avenue, he stopped his car and looked in both directions in Michigan avenue to ascertain the condition of the traffic; that he saw two

241 I.A. 627

APPEAL FROM

MUNICIPAL COURT

ON CRIM. ACC.

ROBERT W. HANCOCK,

Appellant,

YUNION CAR COMPANY,

Appellee.

Opinion filed May 5, 1928.

JUSTICE CLEGG delivered the opinion

of the court.

Plaintiff brought suit against the defendant,

claiming \$150.00 on account of his automobile being struck and damaged by one of defendant company's cars through the

negligent operation of the car. The defendant filed an

affidavit of denial in which it denied that it was guilty

of carelessness or recklessness in the operation of the

car as alleged, but on the contrary, averred that the

damages claimed by plaintiff resulted from his own care-

lessness in operating his automobile. The defendant further

in its affidavit of denial denies that the defendant herein

owned, operated, maintained or controlled the automobile ex-

posed that it occurred as a result of a collision. The case was

tried before the court without a jury and there was a find-

ing in plaintiff's favor for \$50.00 and the defendant appeals.

Plaintiff testified that about midnight he was

driving his own automobile east in Van Hook street and

when he came to the west side of Madison street, he stopped

his car and looked in both directions in Madison street

to ascertain the condition of the street; that he saw two

yellow cabs coming south on Michigan avenue; that they were racing, abreast of each other; that when he saw these cabs they were about one block north at Jackson Boulevard; that he started up his automobile driving east intending to turn north in Michigan avenue and that when he was about half way across the boulevard the yellow cab to the east struck the rear part of his automobile, damaging it; that he called up the insurance company who requested him to take the automobile to be repaired to the James Levy Motor Company and that he did so; that that company made the repairs and he paid its bill of \$110.00. He further testified that before the accident his car was in perfect condition, almost new and had never been in an accident before. Plaintiff called another witness who was connected with the James Levy Motor Company who testified concerning the repairs on plaintiff's machine. The defendant put in no evidence and the court found the issues in favor of the plaintiff and assessing his damages, as above stated, in the sum of \$99.60.

The defendant contends that since it in its affidavit of merits denied the ownership and operation of the cab in question, it was incumbent upon plaintiff to prove that defendant owned and operated the cab at the time of the collision and it is argued that the evidence fails to prove these facts. We think the evidence was sufficient to warrant the finding of the trial judge. Plaintiff testified that when he reached the west side of Michigan avenue in Van Buren street and stopped his automobile he saw "two yellow cabs" to the north about Jackson Boulevard and that they were racing. A reading of the evi-

yellow cab coming north on Michigan Avenue; that they
were traveling, abreast of each other, that when he saw
these cabs they were about one block north of Jackson
Boulevard; that he started up his automobile driving east
intending to turn north in Michigan Avenue and that when
he was about half way across the boulevard the yellow
cab to the east struck the rear part of his automobile,
damaging it; that he called up the insurance company
who requested him to take the automobile to be repaired
to the James Levy Motor Company and that he did so; that
that company made the repairs and he paid its bill of
\$110.00. He further testified that before the accident
his car was in perfect condition, almost new and had never
been in an accident before. Plaintiff called another wit-
ness who was connected with the James Levy Motor Company
who testified concerning the repairs on Plaintiff's machine.
The defendant put in no evidence and the court found the
issues in favor of the plaintiff and assessing his damages,
as above stated, in the sum of \$550.00.

THE DEFENDANT CONTAINS THAT SINCE IT IS IN THE
ABILITY OF THE DEFENDANT TO DENY THE OWNERSHIP AND OPERATION
OF THE CAB IN QUESTION, IT WAS INCUMBENT UPON PLAINTIFF
TO PROVE THAT DEFENDANT OWNED AND OPERATED THE CAB AT THE
TIME OF THE COLLISION AND IT IS ALLEGED THAT THE EVIDENCE
FAILS TO PROVE THESE FACTS. WE THINK THE EVIDENCE WAS
SUFFICIENT TO WARRANT THE FINDING OF THE TRIAL JUDGE.
PLAINTIFF TESTIFIED THAT WHEN HE REACHED THE WEST SIDE OF
MICHIGAN AVENUE IN VAN BUREN STREET AND STOPPED HIS AUTO-
MOBILE HE SAW TWO YELLOW CABS ON THE WEST SIDE OF THE
BOULEVARD AND THAT THEY WERE TRAVELING. A TRUCK OF THE

dence in the record discloses the fact that when counsel for defendant was cross-examining plaintiff it was assumed that the cab that struck plaintiff's automobile was one of the defendant's cabs. Among other things the record discloses that during cross-examination of plaintiff by counsel for defendant, the court said to counsel for defendant "You don't deny the collision occurred, do you? And counsel for defendant said "All right; I won't go any further on that." And the entire cross-examination seemed to assume that plaintiff's testimony showed that the cab that struck plaintiff's Buick car belonged to the defendant.

The defendant further contends that the evidence discloses that plaintiff was guilty of contributory negligence and in support of this the argument seems to be that from plaintiff's own testimony it appeared that when he stopped his car at the west side of Michigan Avenue and looked north he saw two yellow cabs racing near Jackson Boulevard and then started up but never looked north again until he was struck, and that this discloses that he was guilty of negligence. We think this argument cannot be sustained. At most it was a question of fact for the court because it appears as plaintiff started across the boulevard he thought he had ample time to pass over before the cabs reached that place. He testified that when he saw the cabs at Jackson "it looked like I had a whole block start of them". Whether the plaintiff was guilty of negligence and whether the defendant was guilty of negligence, were both questions of fact for the trial judge. And his finding in favor of the plaintiff we think was warranted by the evidence. In fact we think the judgment should have been for \$110.00 in place of

hence in the record discloses the fact that when counsel for defendant was cross-examining plaintiff it was assumed that the car that struck plaintiff's automobile was one of the defendant's cars. Among other things the record discloses that during cross-examination of plaintiff by counsel for defendant, the court said to counsel for defendant "You don't deny the collision occurred, do you? And counsel for defendant said "All right; I won't go any further on that." And the entire cross-examination seemed to assume that plaintiff's testimony showed that the car that struck plaintiff's truck was belonged to the defendant.

The defendant further contends that the evidence discloses that plaintiff was guilty of contributory negligence and in support of this the argument seems to be that from plaintiff's own testimony it appeared that when he stopped his car at the west side of Michigan Avenue and looked north he saw two yellow cabs racing west Jackson Boulevard and then started up but never looked north again until he was struck, and that this discloses that he was guilty of negligence. We think this argument cannot be sustained. At most it was a question of fact for the court because it appears as plaintiff started across the boulevard he thought he had ample time to pass over before the cabs reached that place. He testified that when he saw the cabs at Jackson "it looked like I had a whole block start of them". Whether the plaintiff was guilty of negligence and whether the defendant was guilty of negligence, were both questions of fact for the trial judge. And his finding in favor of the plaintiff we think was warranted by the evidence. In fact we think the judgment should have been for \$10.00 in place of

\$39.60 because plaintiff testified that he paid that amount to repair the car and the evidence discloses that the repairs were rendered necessary on account of the collision in question. Gloyes v. Plastik, 231 Ill. App. 183; Wicks v. Cuneo-Henneberry Co., 319 Ill. 348; Gold v. Rousse and Wolf, Gen. No. 30810, Appellate Court, First District, Illinois. See also Johnson v. Canfield Swigart Co., 292 Ill. 100.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

100.00 because plaintiff testified that he paid that amount to repair the car and the evidence discloses that the repairs were rendered necessarily on account of the collision in question. Wicks v. Wicks, 231 Ill. App. 183; Wicks v. Wicks, 230 Ill. 363; Wicks v. Wicks and Wife, 230 Ill. 361. Appeal granted, Illinois. See Wicks v. Wicks, 230 Ill. 361.

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416 - 30679

CITY OF CHICAGO,

Appellee,

v.

FRED G. BIEDENKAPP,

Appellant.

241 I.A. 628

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1936.

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

Fred G. Biedenkapp was found guilty of a
violation of sec. 2655 of the Chicago Municipal Code of
1922 and a fine of \$50.00 was assessed against him and
he appeals.

A sworn complaint, by leave of court, was filed
wherein it was charged that the defendant on the 18th of
July, 1925, "did make, aid, countenance and assist in
making an improper noise, riot, disturbance, breach of the
peace and diversion tending to a breach of the peace." and
that he "did with other persons, to this affiant unknown,
collect in a body or crowd for unlawful purposes and to the
annoyance and disturbance of other persons" in violation
of the above mentioned section of the Municipal Code. A trial
by jury was waived and the cause submitted to the court and
after hearing the defendant was found guilty of violating the
ordinance in question. A motion for a new trial was made
and heard. The next day the motion was allowed and the record
then states that thereupon the cause came on for trial before
the court without a jury "and the court heard the evidence and

241 A. 628

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Appellee,

Appellant.

FRANK G. BIEDENKAPF,

Appellant.

Opinion n filed May 5, 1936.

MR. JUSTICE O'CONNOR delivered the opinion

of the court.

Frank G. Biedenkopf was found guilty of a violation of sec. 8665 of the Chicago Municipal Code of 1935 and a fine of \$50.00 was assessed against him and he appeals.

A sworn complaint, by leave of court, was filed wherein it was charged that the defendant on the 18th of July, 1935, "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace," and that he "did with other persons, to this effect unknown, collect in a body or crowd for unlawful purposes and to the annoyance and disturbance of other persons" in violation

of the above mentioned section of the Municipal Code. A trial by jury was waived and the cause submitted to the court and after hearing the defendant was found guilty of violating the ordinance in question. A motion for a new trial was made and heard. The next day the motion was allowed and the record then states that thereupon the cause came on for trial before the court without a jury "and the court heard the evidence and

arguments of counsel." The defendant was found guilty of violating the ordinance and a fine of \$50.00 was imposed. Judgment was entered on the finding and the defendant appeals.

From the evidence it appears that there was a meeting in Dickinson street near its intersection with Milwaukee avenue in Chicago and that the defendant was addressing the meeting when he was arrested by a police officer. The officer testified that he was called to the place in question "where a crowd had congregated * * * and heard them talking about the United States sending uniformed troops to China to protect the Morgan interests * * * We told them they had to disperse and they refused to disperse, so we locked them up. The sidewalks were thick --" The officer was then interrupted by counsel for the defendant who advised the court that the charge on which the defendant was being tried was "disorderly conduct". The officer further testified that when he tried to disperse the crowd they said we had no right to disperse them and they wanted to be arrested;" that the defendant was talking "about the United States and England too"; that the witness listened to the defendant's talk "and when we went to disperse them they said 'here is some more of the uniformed troops'". The record then discloses that counsel for the defendant stated that about a year prior to the time in question citizens had made complaints to the police department downtown about being arrested for addressing meetings in the street and they were advised by the head of the police department that the matter had been left to the captains in the several districts to arrange about such meetings being held; that if the captains found that such meetings were obstructing traffic

arguments of counsel." The defendant was found guilty of violating the ordinance and a fine of \$50.00 was imposed. Judgment was entered on the finding and the defendant appeals.

From the evidence it appears that there was a meeting in Wisconsin street near its intersection with Milwaukee avenue in Chicago and that the defendant was addressing the meeting when he was arrested by a police officer. The officer testified that he was called to the place in question "where a crowd had congregated" and heard them talking about the United States sending uniformed troops to China to protect the foreign interests. "We told them they had to disperse and they refused to disperse," so we looked them up. The sidewalks were thick. The officer was then interrupted by counsel for the defendant who advised the court that the charge on which the defendant was being tried was "disorderly conduct". The officer further testified that when he tried to disperse the crowd they said we had no right to disperse them and they wanted to be arrested; that the defendant was talking about the United States and England too; that the witness listened to the defendant's talk and when we went to disperse them they said there is some more of the uniformed troops. The record then discloses that counsel for the defendant stated that about a year prior to the time in question citizens had made complaints to the police department downtown about being arrested for addressing meetings in the street and they were advised by the head of the police department that the matter had been left to the captain in the nearest district to arrange about such meetings being held; that if the captain found that such meetings were obstructing traffic

or causing a disturbance, it was the officers duty to stop the meeting, and that afterwards the matter had been taken up with the captain of the district in question and the matter satisfactorily arranged so that meetings might be held at the place where the meeting was being held on the evening in question.

The defendant testified that at the time in question he was discussing "the Chinese situation" and had in his possession at that time the "Industrial Relations Report of 1915" which he had obtained from the public library; that he explained the struggle then going on in China, which he contended was for the possession of Chinese resources on the part of foreign capital and that if the Chinese resisted it would be necessary to protect Wall street and London and send over a uniformed army;" that when he had reached this point the officer stepped up and asked him if he had a permit, to which the defendant replied that he did not think one was necessary; that he was then placed under arrest. He further testified in response to questions put to him by the court that he was an organizer of labor unions. It further appears that the printed report which the defendant had was one prepared by the United States Commission on Industrial Relations. This is all the evidence in the record.

Counsel for the defendant contends that the judgment of the court is wrong and should be reversed because the record discloses that when the court granted the defendant a new trial, he heard no further evidence, but imposed a fine of \$50.00 in lieu of the \$100.00 fine which had been assessed against the defendant the day before. Upon a care-

on causing a disturbance, it was the officers duty to stop the meeting, and that afterwards the matter had been taken up with the captain of the district in question and the matter satisfactorily arranged so that meetings might be held at the place where the meeting was being held on the evening in question.

The defendant testified that at the time in question he was discussing "the Chinese situation" and had in his possession at that time the "Industrial Relations Report of 1912" which he had obtained from the public library; that he explained the struggle then going on in China, which he contended was for the possession of Chinese resources on the part of foreign capital and that if the Chinese resisted it would be necessary to protest Wall Street and London and send over a uniformed army; that when he had reached this point the officer stepped up and asked him if he had a permit to which the defendant replied that he did not think one was necessary; that he was then placed under arrest. He further testified in response to questions put to him by the court that he was an organizer of labor unions. It further appears that the printed report which the defendant had was one prepared by the United States Commission on Industrial Relations. This is all the evidence in the record.

Counsel for the defendant contends that the judgment of the court is wrong and should be reversed because the record discloses that when the court granted the defendant a new trial, he heard no further evidence, but imposed a fine of \$20.00 in lieu of the \$100.00 fine which had been assessed against the defendant the day before. Upon a care-

ful consideration of all the evidence, we are clearly of the opinion that the only reason that the court granted a new trial was to reduce the fine from \$100.00 to \$50.00. It would serve no useful purpose to introduce the same evidence and there was no contention that there would be any other or different evidence had the matter been reheard. The defendant further contends that it is clear from the evidence that the defendant was not guilty of any disorderly conduct and that the imposition of the fine was, therefore, unwarranted. We think this contention must be sustained. There is no evidence to show that the crowd was of such size as to interfere with the traffic in the street, nor is there any evidence that there was any disturbance on account of the meeting, except possibly when it was being dispersed, but no charge is made against the defendant that he was placed under arrest or the fine imposed on account of any disturbance that may have been caused in dispersing the crowd. But counsel for the city contend that under the ordinance of the city, it was necessary for the defendant to obtain a permit to hold the meeting in question and that having failed to do so was a violation of the city ordinance and warranted the imposition of the fine. There is no such ordinance in the record before us and although the Municipal Court takes judicial notice of the ordinances of Chicago, we think it clear upon a reading of the entire record that the defendant was not tried for the reason that he failed to obtain a permit, but that the charge against him was that he was violating some ordinance in addressing the meetings in the manner shown by the evidence. Upon a careful consideration of all the evidence in the record, we think it is clear that there was no disturbance

The consideration of all the evidence, we are clearly of
 the opinion that the only reason that the court granted
 a new trial was to reduce the fine from \$100.00 to \$50.00.
 It would serve no useful purpose to introduce the same
 evidence and there was no contention that there would be
 any other or different evidence had the matter been re-
 heard. The defendant further contends that it is clear
 from the evidence that the defendant was not guilty of any
 disorderly conduct and that the imposition of the fine was,
 therefore, unwarranted. We think this contention must be
 sustained. There is no evidence to show that the crowd
 was of such size as to interfere with the traffic in the
 street, nor is there any evidence that there was any dis-
 turbance on account of the meeting, except possibly when
 it was being dispersed, but no charge is made against the
 defendant that he was placed under arrest or the fine im-
 posed on account of any disturbance that may have been
 caused in dispersing the crowd. But counsel for the
 city contend that under the ordinance of the city, it was
 necessary for the defendant to obtain a permit to hold
 the meeting in question and that having failed to do so was a
 violation of the city ordinance and warranted the imposition
 of the fine. There is no such ordinance in the record before
 us and although the Municipal Court takes judicial notice
 of the ordinances of Chicago, we think it clear upon a reading
 of the entire record that the defendant was not tried for the
 reason that he failed to obtain a permit, but that the charge
 against him was that he was violating some ordinance in
 addressing the meeting in the manner shown by the evidence.
 Upon a careful consideration of all the evidence in the
 record, we think it is clear that there was no disturbance

of the peace caused by the defendant in what he said, nor can we say from the record that the crowd was of such size as to interfere with the traffic in the street and sidewalk. In these circumstances, the evidence does not support the finding and judgment of the trial judge, and, therefore, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

of the peace caused by the defendant in what he said.
not can we say from the record that the crowd was of such
size as to interfere with the traffic in the street and
also as to interfere with the traffic in the street and
support the finding and judgment of the trial judge, and
therefore, the judgment of the Municipal Court of Chicago
is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS J. AND TAYLOR, J. CONCUR.

241 I.A. 62

CHICAGO TITLE AND TRUST COMPANY,
as Administrator of the Estate
of HARRIOT BENTON WARD, Deceased,

Claimant and Appellant,

v.

CHARLES A. WARD, Executor of the
Estate of GEORGE C. BENTON, Deceased,

Defendant and Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On January 4, 1926, counsel for the Chicago
Title and Trust Company, as Administrator of the Estate
of Harriot Benton Ward, deceased, filed in this court
the mandate of the Supreme Court of this State, and on
February 24, 1926, moved to have the cause reinstated,
redocketed and taken under advisement, for the purpose
of acting upon the directions of the Supreme Court.

The mandate of the Supreme Court is that the
cause be remanded to this court "with directions either to
affirm the judgment, or if there was error in the matter
of law requiring a reversal, which error can be corrected
on another trial, to remand the cause in order that the
error may be corrected, or if final judgment is entered,
the ultimate facts found differently from the facts as
found by the Circuit Court shall be incorporated in the
judgment." The Chicago Title and Trust Company, Adm. v.

3411A.83

CHICAGO TITLE AND TRUST COMPANY
ADMINISTRATOR OF THE ESTATE
OF HARRIOT BOSTON WARD, deceased.
Plaintiff and Appellant,
vs.
JAMES H. WARD, Executor of the
Estate of HARRIOT B. WARD, deceased.
Defendant and Appellee.

On January 4, 1926, counsel for the Chicago Title and Trust Company, as administrator of the estate of Harriot Boston Ward, deceased, filed in this court the mandate of the Supreme Court of this State, and on February 24, 1926, moved to have the cause retried, reheard and taken under advisement, for the purpose of asking upon the division of the Supreme Court.

The mandate of the Supreme Court is that the cause be remanded to this court "with directions either to affirm the judgment, or if there was error in the entry of law requiring a reversal, which error can be corrected by another trial, to remand the cause in order that the same may be retried, or if final judgment is rendered, the cause is to be retried." The Chicago Title and Trust Company, as administrator of the estate of Harriot Boston Ward, deceased, filed in this court the mandate of the Supreme Court of this State, and on February 24, 1926, moved to have the cause retried, reheard and taken under advisement, for the purpose of asking upon the division of the Supreme Court.

Charles T. Ward, decd., 319 Ill. 201.

The record shows that at the close of all the evidence there were presented to the trial judge certain statements of fact which in his decision of the case he was asked to find specially, two of which he marked "refused." They are as follows:

"That at the date of her death (April 18, 1896), Harriot T. Ward was the owner of three hundred and fifty (350) shares of the capital stock of the Delta & Pine Land Company of Mississippi, standing in her name on the books of the company and represented by certificate No. 83 for one hundred (100) shares, certificate No. 84 for one hundred (100) shares, certificate No. 85 for one hundred (100) shares and certificate No. 86 for fifty (50) shares."

"That on February 28, 1896 Harriot T. Ward was the owner of three hundred and fifty (350) shares of the capital stock of the Delta & Pine Land Company of Mississippi, standing in her name on the books of the company and represented by certificate No. 83 for one hundred (100) shares, certificate No. 84 for one hundred (100) shares, certificate No. 85 for one hundred (100) shares, and certificate No. 86 for fifty (50) shares."

In our former opinion in this case, we held that Harriot T. Ward, immediately prior to the time of her death on April 18, 1896, was the owner of three hundred and fifty shares of the capital stock of the Delta & Pine Land Company which stood in her name on the books of the Company, and that on or about February 28, 1896, her estate was the owner of the same three hundred and fifty shares of the capital stock of the Delta & Pine Land Company.

Having found those facts, as shown by our

The record shows that at the time of the evidence there were presented to the trial judge certain statements of fact which in his decision of the case he was asked to find especially, two of which are marked "admitted." They are as follows:

"That at the date of her death (April 12, 1908), Harry E. Land was the owner of three hundred and fifty (350) shares of the capital stock of the Delta & Pine Land Company of Mississippi, standing in her name on the books of the company and represented by certificate No. 85 for one hundred (100) shares, certificate No. 86 for one hundred (100) shares, certificate No. 87 for one hundred (100) shares and certificate No. 88 for fifty (50) shares."

"That on February 22, 1908 Harry E. Land was the owner of three hundred and fifty (350) shares of the capital stock of the Delta & Pine Land Company of Mississippi, standing in her name on the books of the company and represented by certificate No. 85 for one hundred (100) shares, certificate No. 86 for one hundred (100) shares, certificate No. 87 for one hundred (100) shares, and certificate No. 88 for fifty (50) shares."

In our former opinion in this case, we held

that Harry E. Land, immediately prior to the date of her death on April 12, 1908, was the owner of three hundred and fifty shares of the capital stock of the Delta & Pine Land Company which stood in her name on the books of the company, and that on or about February 22, 1908, her estate was the owner of the same fifty shares and fifty shares of the capital stock of

reasoning in our former opinion in this case to be different from the facts as found by the trial judge, and those facts being substantial and ultimate facts in the determination of the case, it becomes necessary, in following the mandate of the Supreme Court, to incorporate a finding of fact in our judgment. Accordingly, the judgment will be affirmed as to the claim for 25 shares of stock of the Chicago Title and Trust Company, and reversed as to the 350 shares of the capital stock of the Delta Company; and judgment will be entered here in favor of the Chicago Title and Trust Company, as administrator of the estate of Harriet Benton Ward, deceased, and against Charles M. Ward, as executor of the estate of George W. Benton, deceased, in the sum of \$183,472.00, with a finding of fact.

Judgment reversed in part and judgment here, with a finding of fact.

JUDGMENT REVERSED IN PART AND JUDGMENT
HERE WITH A FINDING OF FACT.

FINDING OF FACT:

We find that George W. Benton gave out-right to his daughter, Harriet J. Benton Ward, 350 shares of the capital stock of the Delta Company, and that they belonged to her in her lifetime, and upon her death to her estate.

O'CONNOR, J. CONCURS;
THOMSON, P. J. ESPECIALLY CONCURRING:

While, in view of the decision of the Supreme Court in this case, to which reference is made in the

foregoing opinion, and in view of the findings of fact expressly refused by the trial court and the decision of a majority of this court contrary to that action and in accord with the findings of fact submitted to the trial court, but there refused, I concur in the making of a finding of fact, by this court, I do not concur in the finding as made. For the reasons set forth at length in the dissenting opinion filed in connection with the decision of this court in this case, filed June 17, 1925, I am of the opinion the judgment of the Circuit Court of Cook County, appealed to this court, should be here affirmed both as to the Chicago Title and Trust Company stock and as to the Delta & Pine Land Company stock.

LEAFGREEN CONSTRUCTION CO.,)
a corp.,)

Appellee,)

v.)

OLIVER L. WATSON,)

Appellant.)

241 I.A. 628

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 5, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 9, 1923, the plaintiff, Leafgreen Construction Company, a corporation, filed a statement of claim in the Municipal Court, seeking to recover two amounts of money, \$408.00 and \$350.00, respectively, for releasing two mechanics liens on certain real estate. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of \$408.00. This appeal is therefrom.

The evidence shows that the claim for \$350.00 was paid by the defendant after suit was begun, so that there is here involved only the claim for \$408.00. The statement of claim, as it pertains to the \$408.00, is as follows:

"Plaintiff alleges: That on or about the 19th day of March, 1923, Oliver L. Watson agreed with this plaintiff that if this plaintiff would release its mechanic's lien it then had against Lot Twelve (12) in Block Sixteen (16) in McIntosh Bros. Irving Park Boulevard addition to Chicago, he, Oliver L. Watson, would pay to this plaintiff the sum of Four Hundred Eight (\$408.00) Dollars; Whereupon this plaintiff did deliver to the said Oliver L. Watson, defendant herein, its release of said lien to the said Oliver L. Watson, and the said Oliver L. Watson

241 I.A. 628

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

INVESTMENT CONSTRUCTION CO.,

Plaintiff,

vs.

OLIVER L. WATSON,

Defendant.

Opinion filed May 5, 1936.

MR. JUSTICE TAYLOR delivered the opinion of the

court.

On June 9, 1935, the plaintiff, Investment Construction Company, a corporation, filed a statement of claim in the Municipal Court, seeking to recover two amounts of money, \$408.00 and \$250.00, respectively, for releasing two mechanics from on certain real estate. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of \$408.00. This appeal is therefrom.

The evidence shows that the claim for \$250.00 was paid by the defendant after suit was begun, so that there is here involved only the claim for \$408.00. The statement of claim, as it pertains to the \$408.00, is as follows:

"Plaintiff alleges: That on or about the 19th day of March, 1935, Oliver L. Watson agreed with this plaintiff that if this plaintiff would release its mechanic's lien it then had against lot twelve (12) in Block sixteen (16) in Holmes Wood, Irving Park Boulevard addition to Chicago, he, Oliver L. Watson, would pay to this plaintiff the sum of four hundred and eighty dollars (\$480.00). Whereupon this plaintiff did deliver to the said Oliver L. Watson, defendant herein, the release of said lien to the said Oliver L. Watson, and the said Oliver L. Watson

used said release of lien and filed the same of record, but although this plaintiff has requested the said Oliver L. Watson to pay to this plaintiff the said sum of Four Hundred Eight (\$408.00) Dollars, the said Oliver L. Watson has refused so to do."

The defendant filed an affidavit of merits in which he denied making the agreement, or that the plaintiff delivered a release of lien in reliance on any promise by the defendant; and denied that he, the defendant used a release, or filed one of record.

The chief question in the case on this appeal, is whether the verdict was against the manifest weight of the evidence. The evidence of H. A. Leafgreen, the general manager of the plaintiff is substantially as follows:- Having done some construction work or building on two different pieces of real estate the plaintiff filed in the Recorder's office, two mechanic's lien claims covering the property. On or about the 17th or 18th of March, 1923, he, the witness, in one Litke's office, which was shared at the time by the defendant, had a conversation with the defendant. At that conversation there were present himself, the witness, Watson, the defendant, Mrs. Leafgreen, and Mr. and Mrs. Litke. He, the witness, said to the defendant that he wanted money for the work that had been done on the property in question; that he wanted money on lot 12 and lot 6, and, also, for work done on certain other lots. The defendant Watson, in his answer said, "You hold a mechanic's lien on this property and I can't open the loan until you have released the mechanic's lien." The witness then said, "I will release the mechanic's lien if you will pay me." The defendant said, "All right

used said release of lien and filed the same of record, but although this plaintiff has represented the said Oliver L. Watson to pay to this plaintiff the said sum of Four Hundred Eighty (\$488.00) dollars, the said Oliver L. Watson has refused to do so.

The defendant filed an affidavit of service in which he denied making the agreement; or that the plaintiff delivered a release of lien in reliance on any promise by the defendant; and denied that he, the defendant, used a release, or filed one of record.

The chief question in the case on this appeal,

is whether the verdict was against the manifest weight of the evidence. The evidence of R. A. Lentgreen, the

general manager of the plaintiff is substantially as

follows:-- Having done some construction work on building on two different pieces of real estate the plaintiff filed

as the Recorder's office, two mechanic's liens alias

covering the property. On or about the 17th or 18th of

March, 1925, he, the witness, in one like's office which was shared at that time by the defendant, had a conversation

with the defendant. At that conversation there were present himself, the witness, Watson, the defendant, Mrs.

Lentgreen, and Mr. and Mrs. Little. He, the witness, said to the defendant that he wanted money for the work that

had been done on the property in question; that he wanted money on lot 12 and lot 6, and, also, for work done on

certain other lots. The defendant stated, in his answer to the witness, that he would pay him the money and that

he would give him a check for the amount of the money. The witness then said, "I will release the mechanic's

lien if you will pay me." The defendant said, "All right

you go down and give Mr. Bradburn the release deed of the mechanic's lien he will see that it is properly made out, and take it over to the Chicago Title and Trust Company, and the loan can be opened." He, the witness, then sent Mrs. Leafgreen to Mr. Hagan, plaintiff's attorney and got a release deed. He told the defendant at that conversation that he would have the mechanic's liens released. He, the witness, told the defendant at that conversation that "there was \$408.00 coming to the Leafgreen Construction Company on lot 12 * * ", and there was \$360.00 coming on the foundation built on lot 6." \$360.00 was paid after the suit was filed. On cross-examination, the witness stated that early in 1923, he had several conversations with the defendant, who said he was going to finance one Litke, and that he entered into a contract with Litke concerning those buildings; that the defendant told him that he was negotiating with one Willard on lot 12; that the releases of the mechanic's liens were made out in Mr. Hagan's office; that he, the witness, offered them to the defendant about the 17th of March, 1923, after the conversation above referred to; that at the time he offered the release, he asked for payment on six buildings; that he released six buildings for the defendant at that time; that after the releases in question were made out, and he got them from Hagan, he gave them to Mrs. Leafgreen she went down and delivered them to the attorney for the defendant, to whose office he had been told by the defendant to send them. On re-direct examination, he testified that the defendant told him to take them to Bradburn's office (the office of the defendant's attorney), "to see if they were

you go down and give Mr. Friedman the release bond of the mechanic's lien he will see that it is properly made out, and take it over to the Chicago Title and Trust Company, and the loan can be opened." He, the witness, then went Mrs. Leefgreen to Mr. Hagan, Plaintiff's attorney and got a release deed. He told the defendant at that conversation that he would have the mechanic's liens released. He, the witness, told the defendant at that conversation that "there was \$400.00 owing to the Leefgreen Construction Company on lot 13" and there was \$300.00 owing on the foundation built on lot 8." \$200.00 was paid after the suit was filed. On cross-examination, the witness stated that early in 1923, he had several conversations with the defendant, who said he was going to finance one lot, and that he entered into a contract with Little concerning these buildings; that the defendant told him that he was negotiating with one Willard on lot 12; that the release of the mechanic's liens were made out in Mr. Hagan's office; that he, the witness, offered him to be defendant about the 15th of March, 1923, after the conversation above referred to; that at the time he offered the loan, he asked for payment on six buildings; that he received six buildings for the defendant at that time; that after the release in question were made out, and he got them from Hagan, he gave them to Mrs. Leefgreen and went down and delivered them to the attorney for the defendant, to whose office he had been told by the defendant to send them. On re-direct examination, he testified that the defendant told him to take them to Plaintiff's attorney (office of the defendant's attorney), "to see if they were

all right, and put on record, and he would pay me, start to pay us."

The evidence of Estella Leafgreen, president of the plaintiff company, is substantially as follows: She was present in the month of March, 1923, and heard a conversation between her husband and the defendant. At that conversation the defendant told Mr. Leafgreen and her "that if we would remove those mechanic's liens so that he could make a loan on the building that he would pay up on the building." She delivered releases of mechanic's liens to lot 12 and lot 6 to Mr. Bradburn about March 15; that she gave them to him because the defendant had told her to do so. On Cross-examination she testified that at the conversation which occurred when her husband and the defendant were present, the defendant said, "if we would release, take the mechanic's liens off, he would pay us the money," and also said, "If we would release the liens he would make a loan and that he would pay us the money." After that, she went to Hagan's office and got the releases and took them over to the defendant's attorney.

For the plaintiff, the defendant was called, under Section 33, and testified that he was interested in lots 12 and 6, the property in question, in March, 1923. The testimony of the defendant, when testifying for himself, was substantially as follows:- He did not recall having had any conversation with Mr. or Mrs. Leafgreen or Mr. Litke, in March, 1923. He did not have any conversation with Mr. Leafgreen wherein he said he would pay him if he would release a certain

all right, and put on record, and he would pay me, start to
my car."

The evidence of Estelle Lealgreen, president of the
plaintiff company, is substantially as follows: She was pre-

sent in the month of March, 1933, and heard a conversation
between a man and the defendant. At that conversation
also the defendant told Mr. Lealgreen and her "that if we
would remove these mechanics' liens so that he could make
a loan on the building that he would pay up on the building."

She delivered releases of mechanics' liens to let it and let
it to Mr. Bradburn about March 15; that she gave them to
him because the defendant had told her to do so. On cross-

examination she testified that at the conversation which
occurred when her husband and the defendant were present,
the defendant said, "if we would release, take the mechanics'
liens off, he would pay us the money," and also said, "if
we would release the liens he would make a loan and that
he would pay us the money." After that, she went to Hagen's
office and got the releases and took them over to the de-

endant's attorney.

For the plaintiff, the defendant was called, under
Section 33, and testified that he was interested in lots 12
and 5, the property in question, in March, 1933. The testi-

mony of the defendant, when testifying for himself, was sub-

stantially as follows: - He did not recall having had any
conversation with Mr. or Mrs. Lealgreen or Mr. Hagen, in March,
1933. He did not have any conversation with Mr. Lealgreen

again he said he would pay him if he would release a certain

lien on lot 12. He never had a conversation with Mrs. Leafgreen in which he agreed that if the plaintiff would release a mechanic's lien on lot 12 he would pay the Leafgreen Construction Company. In March, 1923, he was interested in lot 12, and had made an agreement with one Litke to advance certain amounts of money in order to complete the building, and Litke conveyed that lot, together with others, to him, the witness. Leafgreen informed them in June or July, 1923, that he had a mechanic's lien against lot 12. The agreement he, the witness, made to get the building was made about March 12, and the title conveyed to him a few days thereafter.

There was offered in evidence through one of the clerks of the Circuit Court, a record of the Mechanic's lien, which was placed on lot 12 on January 13, 1923, and also evidence that it was satisfied by a release filed on March 19, 1923.

It is urged for the defendant that although Leafgreen said, "I will release the mechanic's lien if you will pay me," and the defendant said, "All right," and although the plaintiff did thereafter, pursuant to that conversation, release the liens, there was no binding obligation on the defendant. With that we cannot agree. Even if the defendant had no interest in the property at the time, which is contrary to what the evidence shows, those facts would establish liability. The offer was definite and there was acceptance and execution by the plaintiff. The law of contracts requires no more. It is not a question of benefit to the defendant; but after he had made the offer it was only

lien on lot 12. He never had a conversation with Mrs. Leetgreen in which he agreed that if the plaintiff would release a mechanic's lien on lot 12 he would pay the Leetgreen Construction Company. In March, 1933, he was interviewed in lot 12, and had made an agreement with one Little to advance certain amount of money in order to complete the building, and Little conveyed lot 12, together with others, to him, the witness. Leetgreen informed them in June or July, 1933, that he had a mechanic's lien against lot 12. The agreement he, the witness, made to get the building was made about March 12, and the title conveyed to him a few days thereafter.

There was offered in evidence through one of the clerks of the District Court, a record of the Mechanic's Lien, which was placed on lot 12 on January 12, 1933, and also evidence that it was satisfied by a release filed on March 16, 1933.

It is urged for the defendant that although Mr. Leetgreen said, "I will release the mechanic's lien if you will pay me," and the defendant said, "All right," and although the plaintiff did thereafter, pursuant to that conversation, release the lien, there was no binding obligation on the defendant. With that we cannot agree. Even if the defendant had no interest in the property at the time, which is contrary to what the evidence shows, those facts would establish liability. The offer was definite and there was acceptance and execution by the plaintiff. The law of contracts requires no more. It is not a question of benefit to the defendant; but after he had made the offer it was only

a question of acceptance and performance by, or detriment to, the plaintiff.

It is contended that the trial judge erred in giving the following instruction:

"The Court instructs the jury that if you believe from all the evidence that the lien was on record and released and unpaid at the time of the transaction between Mr. Litke and Watson, in that event the verdict should be for the plaintiff."

There is no doubt but that that instruction was bad and should not have been given. But the record shows that the trial judge before giving the instructions to the jury told counsel that the instructions would be considered as oral instructions and that if they had any objections they should note them before the jury retired, and the record also shows that after the instructions were given the only objection made was by counsel for the defendant, who merely said, "Let the record show an objection to each and every one of the instructions." Of course that was, under the law, insufficient; the defects, whatever they were, should have been pointed out and called to the attention of the trial judge.

It is urged that the trial judge erred in not granting a new trial based on a motion made for the defendant, supported by an affidavit made by him and an affidavit made by his attorney. The affidavits set up newly discovered evidence, but neither one states any sufficient reason why that evidence was not produced at the trial. People v. Williams, 242 Ill. 197. Further, the affidavit of the defendant to the effect that a contract had been made by

a question of competence and performance by, or detriment to, the plaintiff.

It is contended that the trial judge erred in giving the following instruction:

"The Court instructs the jury that if you believe from all the evidence that the lien was an honest and lawful one and was paid at the time of the transaction between Mr. Little and Watson, in that event the verdict should be for the plaintiff."

There is no doubt but that instruction was bad and should not have been given. But the record shows that the trial judge before giving the instructions to the jury told counsel that the instructions would be considered as oral instructions and that if they had any objections they should note them before the jury retired, and the record also shows that after the instructions were given the only objection made was by counsel for the defendant, who merely said, "Let the record show an objection to each and every one of these instructions." Of course that was under the law, insufficient; the defense, whatever they were, should have been pointed out and called to the attention of the trial judge.

It is urged that the trial judge erred in not granting a new trial based on a motion made for the defendant, supported by an affidavit made by him and an affidavit made by his attorney. The affidavits set up newly discovered evidence, but neither one states any sufficient reason why that evidence was not produced at the trial. People v. Williams, 242 Ill. 137. Further, the affidavit of the defendant to the effect that a contract had been made by

the plaintiff with Litke in February, 1923, to release the lien on lot 12, block 16, does not necessarily mean that that contract was in force in March, 1923. Negotiations might have taken place whereby that contract had been cancelled. The law requires, in such affidavits, accurate and exhaustive statements. As to the affidavit of the attorney for the defendant, it set up that on February 25, 1923, he had in his possession certain releases of the liens in question which he had received from the plaintiff, and was asked to record them for Litke; that he was told they were executed on the promise of Litke to pay the amounts of them after certain loans had been made; that he was informed and believed that they were the releases mentioned in the statement of claim; that the releases were in his office for a period of about four weeks, when he gave them to Litke and Leafgreen, the manager of the plaintiff. That affidavit shows that he knew all those facts when he was trying the case. Certainly he was not entitled after a trial and verdict, to base a motion for a new trial on evidence which he might have used, but kept back.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

PEOPLE ex rel JOHN MARTIN,

Appellee,

v.

NICHOLAS R. FINN, ET AL ETC.,

Appellants.)

241 I.A. 628

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 5, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a petition for a writ of certiorari, brought in the Superior Court of Cook County by John Martin against Nicholas R. Finn, Edward J. Evans and John A. Pelka, as Civil Service Commissioners, to quash the record of the Civil Service Commission in certain proceedings wherein the petitioner was discharged from the position of Captain, Department of Police, and from the service of the City of Chicago.

The writ of certiorari having been issued pursuant to the petition, the respondents made a return to the writ, reciting a record of the proceedings before them, and then moved to quash the writ and to dismiss the petition. The petitioner moved to quash the record returned by the respondents. The court heard both motions, and overruled the motion of the respondents and granted the motion of the petitioner. From that order of the court, the respondents have prosecuted this appeal.

The return of the respondents is as follows:

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Opinion filed May 2, 1938.

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DOI: 10.1002/anie.200704242

Journal of Interpersonal Violence 26(10)

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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Journal of Interpersonal Violence 28(10) 1976-1991
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REPORTS ON THE PROGRESS OF THE WORK OF THE COMMISSION

"First: That on February 21, 1924, charges against the petitioner, John Martin, were preferred by John A. Collins, as Superintendent of Police of the City of Chicago, together with specifications of particular acts and conduct constituting the respective violations charged, which charges and specifications are hereinafter fully set out as part of the record and return in this cause, and said charges and specifications were filed with the respondent, Civil Service Commission of Chicago.

Second: That the respondent caused to be issued upon said charges so preferred and filed before it a written form of notice directed to said petitioner, John Martin, commanding him to be and appear before the respondent in Room 612 City Hall, on the 28th day of February, A. D. 1924, at 1 o'clock p.m., to answer and defend against said charges; that a copy of such charges was made to accompany said notice; that said petitioner John Martin in writing was on the 23rd day of February, 1924, duly served with said notice by having a copy thereof delivered to him by Sergeant Charles P. Engle, that said notice issued by the respondent, and the proof of service thereof on the petitioner was fully shown by the record in this cause hereinafter set out as part of the record and return herein.

Third: That to sustain the charges aforesaid, the respondent heard the testimony of the witnesses in connection with the charges filed, a true, full and complete transcript of which is incorporated in the record of the Commissioner hereinafter set out in this return as part thereof.

Fourth: That the following is a true, full and complete transcript of the record of said proceedings affecting this petitioner certified by the secretary of the respondent, to-wit: "

There is then set out in the return of the respondents a copy of the notice to the petitioner, the receipt of the petitioner of the notice, an affidavit of service of the notice on the petitioner, the charges filed with the Civil Service Commission against the petitioner, a list of the witnesses, the findings and decision of the Civil Service Commission, and the order of discharge of the petitioner.

The finding of the Civil Service Commission is to the effect that the petitioner appeared in person and was

represented by counsel at the hearings, who participated in the examination of witnesses;

"that all the witnesses were duly sworn, and the foregoing testimony, which is a part of the record herein, and of this finding, was fully given by them.

"The Commissioners further find that they have jurisdiction over the subject-matter herein and of the person of said Captain John Martin, and from a consideration of all the evidence before them, the Commissioners find the said Captain John Martin guilty of violation of paragraphs 6 and 11 of Section 1 of Rule 30 of the Rules and Regulations of the Department of Police of the City of Chicago; that he is guilty of neglect of duty, and incapacity or inefficiency in the service."

The return of the writ further recites very elaborately three separate charges of neglect or breach of duty, or incapacity or inefficiency. They are as follows:

"1. In that the said Captain John Martin (#2) Captain of Police, City of Chicago, assigned to the 28th Police District, on or about July 12, 1923, did fail and neglect to investigate, take action or report to his superior officers on a report made to him by Sergeant Michael Barron of said 28th Police District of Chicago aforesaid, in which said Sergeant Barron stated that he had been told by Patrolman Dempsey of said 28th District that about 1:30 a.m. on or about July 11, 1923, said Dempsey, then in charge of Ford auto No. 1 of the 28th Police District aforesaid, had seen two brewery trucks, loaded with beer, or what was supposed to be beer, being driven at a high rate of speed north on Clybourn avenue near Fullerton avenue, Chicago, Illinois, in the vicinity of the North American Brewery; that at about said last mentioned time, Sergeant William W. Beehan of the said 28th Police District, assigned to detective duty, came across the street, and had asked said Dempsey if he was waiting for beer trucks, to which Dempsey replied in the affirmative, and that the said Sergeant Beehan had then told the said Dempsey that six more trucks were going to pull out of the brewery, whether Dempsey liked it or not, or words to that effect; that the Ford auto crew then went down to, and pulled the box, and shortly thereafter returned to the corner of Fullerton avenue and Clybourn avenue where they saw Lieutenant Loftus,

assigned to desk duty at the said 29th Police District station, also he said Sergeant William H. Bushan and the said Lieutenant Loftus did then and there order the said Ford auto crew away from said brewery, telling them to go to the other end of the district; Loftus said there had been a hold-up down there (which occurred earlier in the evening); also, that the said Lieutenant Loftus had ordered him, Sergeant Barron, to take Dempsey off the Ford.

The said Sergeant Michael Barron, in reporting as aforesaid to the said Captain John Martin (#2) told the said Captain John Martin (#2) referring to Patrolman Dempsey, that men should not be interfered with who were doing their duty.

2. In that the said Captain John Martin (#2) did on or about October 25, 1923, received from the Superintendent of Police a complaint dated October 23, 1923, reading as follows:

'Meyer: Taxi Inn, 2138 Lincoln Avenue, woman found in cab with clothes stripped off. She said she got booze at Taxi Inn.'

This complaint the said Captain John Martin (#2) assigned to Sergeant Charles H. Smith, Patrolmen Jullaly and Dyer of the said 29th Police District, and Captain Martin took no action and made no report thereon, as ordered, until November 6, 1923, when in a communication of that date to the Superintendent of Police he reported as follows:

'1. Taxi Inn, 2138 Lincoln Avenue; This place opened April 12, 1923. We have no complaint to make against this place. We have received two or three anonymous complaints from the Superintendent's office, but were unable to get any evidence against the place. I am informed this date that a man 40 or 45 years of age, with a young lady from Racine, Wisconsin, and a couple of young men visited this place one night about six weeks ago, and drank some liquor which they brought with them, and later took the woman some place on Peterson road, and assaulted her. I understood the party was arrested somewhere in the neighborhood of Sheridan road and Peterson avenue. I was apprised of this only today. Beyond this I know nothing wrong with the place.'

That the said Captain John Martin did not make and did not cause to be made a proper investigation of said complaint; that he did not, as he should have done after the receipt of said complaint, interrogate or cause to be interrogated one Martha Jones, from Racine, Wisconsin, Werner Wahlman, Henry Bauer, Alvin Nelson, Hugh Cartin and Patrolmen Thomas F. Lowell and Thomas Monahan, the members of the Ford auto crew of the 31st District of Chicago, aforesaid, who in the early morning of September 19,

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THE UNITED STATES DEPARTMENT OF THE INTERIOR
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WASHINGTON, D. C. 20250

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

It is noted that the above information was obtained from a confidential source who has provided reliable information in the past.

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1923, arrested in the neighborhood of Broadway and Irving Park boulevard, Chicago, aforesaid, the said Martha Jones, Werner Wahlman, Henry Bauer, Alvin Nelson and Hugh Cartin. That if the said Captain John Martin had interrogated or caused to be interrogated the said persons above named, including the said named arresting officers, he would have learned of the said arrest of the said Martha Jones, aged nineteen years, from Racine, Wisconsin, who since said date has been committed to the Wisconsin Industrial School for Girls, Werner Wahlman, aged 43 years; Henry Bauer, aged 28 years; Alvin Nelson, aged 18 years; and Hugh Cartin, aged 19 years, by the said Ford auto crew of the 31st Police District of Chicago aforesaid, at 1:45 a.m., September 19, 1923; and that he would have learned also the following facts: That the said persons arrested had been served with intoxicating liquor by the management of said Taxi Inn, and had consumed said liquor therein; that one of the young men had followed Martha Jones into the toilet of said Taxi Inn, and had committed an unnatural act with her in the toilet, showing that the place was not properly conducted; that the foregoing facts should have resulted in the revocation of the license of said Taxi Inn; also that the said Martha Jones had been taken from the said Taxi Inn by the four others arrested with her, and shortly thereafter had been criminally assaulted by them, and that the said Werner Wahlman had been held to the Grand Jury for a crime against nature committed by him with the said Martha Jones on said occasion in the company of said persons shortly after leaving said Taxi Inn.

3. In that the said Captain John Martin did fail and neglect to investigate or cause to be fully investigated an assault upon Patrolman Ernest Hecker of the 17th police district of Chicago aforesaid, which occurred on or about August 13, 1923, in the Blue Star Inn, No. 1500 Clybourn avenue, Chicago, Illinois, in the 29th Police District of Chicago, in which said Ernest Hecker's jaw was broken and his revolver taken from him under circumstances indicating that the said Blue Star Inn was not being conducted properly, and that information was being withheld; also that he failed to question or cause to be questioned the said Patrolman Ernest Hecker with a view of ascertaining what led up to the said assault, with a view of recommending the revocation of license of the said Blue Star Inn, if the circumstances warranted, or of preferring charges against the said Hecker, if Hecker was guilty of any misconduct."

In our judgment, on the question involved in this

appeal, which is whether it is necessary to bring before us, in the record, the evidence that was introduced before the Civil Service Commission, the cases of Funkhouser v. Coffin, et al 301 Ill. 257; Gord v. Coffin, 326 Ill. App. 326, and The People ex rel Murphy v. Finn, et al (General Number 30624) are decisive. In the Gord case we said, "It will thus be seen that (1) it may be unnecessary to return all the evidence; (2) that it is insufficient if the record only shows that the party was found guilty as charged; (3) that, therefore, a proper method to pursue is to have the record recite the particular facts which the commission has found and which it is considered constitute a cause for removal," and in that case we said that the only sure and effective way to assure a superior tribunal that the judgment of the inferior tribunal is not arbitrary or prejudice would be the reproduction of all the evidence, but, "That, however, the Funkhouser case holds is unnecessary."

In the Murphy case, where the return of the respondents to the writ contained substantially the same elements as the return of the respondents in the instant case, the court said: "From an inspection of the record of the Civil Service Commission, we are of the opinion that the Civil Service Commission had jurisdiction of the petitioner and of the subject-matter, and that the Civil Service Commission did not exceed its jurisdiction, or otherwise proceed in violation of law."

Applying the principles announced in the cases above mentioned, we are of the opinion that where the return of the writ recites the record of the Civil Service Commission, and in that record there is set out the charge

and specifications which were filed as the cause of the removal of one in the Civil Service, and there is set out the summons and proof of service, together with delivery of a copy of the charge preferred, and there is set out that the accused appeared in person and by counsel, and defended himself on the merits, and was found guilty by the Commission, and there is set out in the finding of the Commission, the facts that were actually found, and which were substantially in the language of the specifications, and there is set out that the accused was found guilty of the neglect of duty, and incapacity or insufficiency in the service, as charged, such record, on its face, establishes jurisdiction in the Commission, and shows that there has taken place a proper legal proceeding for the removal of a Civil Service employee under Section 13 of the Civil Service Act.

For the reasons stated, the motion of the petitioner to quash the record of the Civil Service Commission should have been denied, and the motion of the respondents to quash the writ of certiorari should have been allowed. The order of the trial court, therefore, is reversed.

ORDER REVERSED.

THOMSON, D.J. AND O'CONNOR, J. CONCUR.

and would have been taken to the court of the
removal of one in the civil service, and there is not one
the language and good of service, together with delivery
at a copy of the charge preferred, and there is not one
that the accused appeared in person and by counsel, and
extended himself on the matter, and was found guilty by
the jury, and there is not one in the finding of the
conviction, the facts that were actually found, and which
were substantially in the language of the question, and
and there is not one that the accused was found guilty
of the crime as charged, and the jury is not one
in the service, as charged, and found, on the facts,
substantially in the language of the question, and which
that there was taken place a proper legal proceeding
for the removal of a civil service employee under section
of the civil service act.

1890

Abstract

AT A TERM OF THE APPELLATE COURT,

and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois,

241 I.A. 629

present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 26 1926 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:



Eric R. Nymen,
Appellee,

v.

Appeal from the Circuit
Court of Winnebago County.

Rockford & Interurban
Railway Company,
Appellant

241 I.A. 629

Jones, P. J.

This is an appeal from a judgment of the circuit court in favor of appellee and against appellant for \$4000 damages recovered because of personal injuries alleged to have resulted from a collision between one of appellant's interurban cars and a truck driven by appellee.

The declaration in this case as amended contained a number of counts but a demurrer was sustained to the 1st, 2nd and 3rd additional counts and the cause was tried on the original count and the 4th and 5th additional counts. The 4th additional count charged wilfulness. The other counts were ordinary negligence counts.

The plaintiff was hauling milk to Rockford in a three ton truck, weighing five or six thousand pounds. He was on a road known as the East Lane or Argyle road. This road runs east and west. The right of way of the defendant company's interurban railway crosses the Argyle road at right angles. As plaintiff was driving in his truck across the tracks of the defendant, one of the latter's cars, then being used as a work train came from the south and collided with the rear end of the truck and thereby injured the plaintiff. He testified that he stopped his car 15 or 16 feet from the east rail of the defendant company's tracks; that he looked and listened to make certain there was no car approaching; that he was unable to observe the approach of the car because of the trees and shrubbery which grew along the right of way and also because the trolley poles were zig-zagged along it. His position was in the cab, but there was a window on his left side so that he could see out toward the approaching car. He testified that

Appeal from the Circuit
Court of Winnebago County.

Eric R. Wyman,
Appellee,

v.

Rockford & Interurban
Railway Company,
Appellant

241 I.A. 639

James, E. J.

This is an appeal from a judgment of the circuit court in
favor of appellee and against appellant for \$4000 damages recovered
because of personal injuries alleged to have resulted from a collision
between one of appellant's interurban cars and a truck driven by

The declaration in this case as amended contained a number
of counts but a demurrer was sustained to the 2nd and 3rd additional
counts and the cause was tried on the original count and the 4th and
5th additional counts. The 4th additional count charged willfulness.
Other counts were ordinary negligence counts.

The plaintiff was hauling milk to Rockford in a three ton
truck, weighing five or six thousand pounds. He was on a road known
as the East Lane or Argyle road. This road runs east and west. The
right of way of the defendant company's interurban railway crosses the
Argyle road at right angles. As plaintiff was driving in his truck
across the tracks of the defendant, one of the latter's cars, then
being used as a work train came from the south and collided with the
rear end of the truck and thereby injured the plaintiff. He testified

that he stopped his car 15 or 16 feet from the east rail of the defendant
company's tracks; that he looked and listened to make certain there
was no car approaching; that he was unable to observe the approach of
the car because of the trees and shrubbery which grew along the right
of way and also because the trolley poles were zig-zagged along it.

His position was in the bed, but there was a window on his left side so
that he could see forward. He testified that

the first time he saw the car it was 250 feet away from him. The evidence tends to show that the car of the defendant was running at a rate of 50 to 60 miles per hour.

From our examination of the record in this case we are unable to comprehend how plaintiff could have stopped his truck where he claims he did and failed to have observed the approaching car. The testimony shows that the shrubbery of which plaintiff speaks was not over 4 feet high. The trees were small ones and the fact that the poles were zig-zagged could not prevent his seeing the approaching car if he had looked. It appears that no matter how fast the car was being operated, the plaintiff would not have been struck had he used ordinary care in determining whether a car was approaching or not.

Ten instructions were given by the court on behalf of plaintiff. Nowhere were the issues defined, but instructions numbered 1, 6, 8, 9 and 10 referred the jury to the declaration to ascertain what issues were involved. This has been repeatedly condemned. (Laughlin v. Hopkinson 292 Ill. 80) While courts will not always reverse a judgment because of such error in instructions, (McFarlane v. Chicago City Ry. Co. 288 Ill. 476,) still under the authority of Krieger v. A. E. & C. R. R. Co. 242 Ill. 544, it is reversible error to instruct the jury that "if plaintiff's physical injuries, resulted from defendant's negligence, if any, as charged in plaintiff's declaration," then they may find for plaintiff in such sum as in the judgment of the jury under the evidence and instructions of the court, will be a fair compensation for such injuries.

In appellee's printed brief it is contended that there was no assignment of error upon the court's overruling the defendant's motion for a new trial, and for that reason the sufficiency of the evidence to sustain the verdict as well as the alleged errors in instructions cannot be reviewed by this court (Kenkakee v. Phipps 135 Ill. App. 585; Munger v. Supancicz 64 Ill. App. 661.) After the briefs were filed, this objection was obviated by leave granted to appellant to assign

The first time he saw the car it was 250 feet away from him. The

evidence tends to show that the car of the defendant was running at a

rate of 50 to 60 miles per hour.

From our examination of the record in this case we are unable

to comprehend how his affidavit could have stopped his truck where he claims

to have stopped. The testimony of the plaintiff's witnesses is to the effect

that the plaintiff's witnesses were not over 150 feet

from the car. The trees were small ones and the fact that the poles were zig-

zagged could not prevent his seeing the approaching car if he had

looked. It appears that no matter how fast the car was being operated,

the plaintiff would not have been struck had he used ordinary care in

determining whether a car was approaching or not.

Then instructions were given by the court on behalf of the plaintiff.

There were the issues defined, but instructions numbered 1, 2, 3 and

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involved. This has been repeatedly condemned. (See *Laughlin v. Hopkinson*)

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of such error in instructions, (*McFarlane v. Chicago City Ry. Co.*, 228

Ill. 476) still under the authority of *Krieger v. A. B. & C. M. Co.*

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the plaintiff's physical injuries, resulted from defendant's negli-

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find for plaintiff in such sum as in the judgment of the jury under the

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the injuries.

In appellee's printed brief it is contended that there was no

assignment of error upon the court's overruling the defendant's motion

for a new trial, and for that reason the sufficiency of the evidence to

support the verdict as well as the alleged errors in instructions con-

sidered by this court (*Kankakee v. Phipps* 185 Ill. App. 556;

Wright v. Supermarket 54 Ill. App. 651.) After the briefs were filed,

additional error; and an assignment was thereupon made as to the court's action in overruling the motion for a new trial.

It is further contended by appellee that appellant's briefs have not been prepared in compliance with Rule 17 of this court, which provides that following the statement of the case, the brief shall conclude with the points made and authorities relied upon in support of them, and that no alleged error or point, not contained in such brief, shall be raised afterwards either by reply brief, in oral or printed argument or on petition for a rehearing. It must be conceded that appellant's briefs were not prepared in strict conformity with said rule. Not all of the points relied upon are mentioned in the brief proper, nor are the authorities in support of them cited. A strict observance of the rules, with reference to the preparation of briefs, greatly aids the court in the examination of a case and a failure to observe them necessarily entails additional labor upon the courts. However, we have thought best to decide this case on the questions of fact and law involved rather than to dispose of it under a technical rule.

The three instructions which were tendered by appellant and refused by the court were argumentative and at least one of them was otherwise incorrect. They were properly refused.

We are of the opinion that this cause should be reversed and remanded.

Reversed and Remanded.

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have not been prepared in compliance with Rule IV of this court, which

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Additional error; and an assignment was thereupon made as to the court's

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
March, in the year of our Lord one thousand
nine hundred and twenty-one.

Justus L. Johnson
Clerk of the Appellate Court.

Eric R. Nyman,
Appellee,

v.

Rockford & Interurban
Railway Company,
Appellant,

Appeal from the Circuit
Court of Winnebago County.

241 I.A. 629

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Reversed and Remanded.

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 629

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 26 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Ernest Brook, as Trustee, etc.,
and M. A. Carmack,

appellees,

vs.

Appeal from Circuit Court
of Lake County.

Pistakee Boat and Engine Co.,
et al, (Pistakee Boat and Engine
Co., appellant)

241 I.A. 629

Jones, P. J.

A decree for foreclosure and sale was entered by the circuit court of Lake County in favor of Ernest Brook, as trustee in a certain deed of trust and against the Pistakee Boat and Engine Company, on April 16, 1925. The complaints in the bill, as filed March 5, 1923, were the said trustee and also one M. A. Carmack, who was alleged to be the owner of the note secured by the deed of trust. The bill alleges that the said Boat and Engine Company was indebted to Robert F. Tarrant in the sum of \$5,000 as evidenced by a certain promissory note dated March 26, 1919, executed by said company and payable to said Tarrant three years after date thereof, with interest thereon at 6% per annum, payable semi-annually; that said Tarrant transferred the note to Carmack for a valuable consideration; that said Carmack is the legal owner and holder thereof; and that the appellant was in default in the payment of principal and interest. Everett Hunter and certain other persons were made defendants as subsequent purchasers, mortgagees and judgment creditors. The bill prayed for an accounting between Carmack and the appellant, for the appointment of a receiver, for foreclosure and for general relief.

The mortgaged premises consisted of certain buildings and real property used by appellant in the manufacture and repair of boats. The deed of trust contained the usual provisions for accelerating the maturity of the note by reason of non-payment of interest, for the allowance of solicitor's fees, and for the appointment of a receiver on motion of the complainant without notice and without bond.

West Brook, as Trustee, etc.,

and M. A. Garmack,

appellees,

vs.

Platakee Boat and Engine Co.,

appellant (Platakee Boat and Engine

appellant)

Appeal from Circuit Court

of Lake County.

241 I.A. 629

A decree for foreclosure and sale was entered by the circuit court of Lake County in favor of Ernest Brock, as trustee in a certain deed of trust and against the Platakee Boat and Engine Company, on April 1, 1922. The complainants in the bill, as filed March 2, 1922, were the said trustee and also one M. A. Garmack, who was alleged to be the owner of the note secured by the deed of trust. The bill alleged that the said Boat and Engine Company was indebted to Robert F. Tarrant for the sum of \$5,000 as evidenced by a certain promissory note dated March 26, 1912, executed by said company and payable to said Tarrant three years after date thereof, with interest thereon at 6% per annum, payable semi-annually; that said Tarrant transferred the note to Garmack for a valuable consideration; that said Garmack is the legal owner and holder thereof; and that the appellant was in default in the payment of principal and interest. Everett Hunter and certain other persons were made defendants as respondents. The bill prayed for an accounting between Garmack and the appellant, for the appointment of a receiver, for foreclosure and for general relief.

The mortgaged premises consisted of certain buildings and real property used by appellant in the manufacture and repair of boats. The deed of trust contained the usual provisions for accelerating the maturity of the note by reason of non-payment of interest, for the allowance of attorney's fees, and for the appointment of a receiver on motion of the complainant without notice and without bond.

The appellant answered admitting the execution and delivery of the note and deed of trust, but denied that Carmack had any interest therein, either as owner and holder, or otherwise; denied that the interest had not been paid on the note, but alleged that interest had been paid from the date of the note to March 26, 1923; and alleged that appellant had a set-off against the principal sum, by reason of an account it held against the said Tarrant for labor and repairs.

The said Everett Hunter also filed an answer in which he admitted, as true, all the material allegations contained in the bill and only claimed an interest by virtue of a sale to him under an execution against appellant.

On March 25, 1923, the court, on motion of complainants' solicitor, appointed the said Everett Hunter receiver of the mortgaged property without notice to appellant and without requiring any bond. A motion was made by appellant to vacate the said order which motion was denied, but an order was entered by the court permitting appellant to enter the premises upon giving bond in the sum of \$2500, which bond was given and appellant was restored to the possession of its property.

The cause was referred to a special master who took and reported the evidence together with his conclusions of fact and law. He found that Carmack had no interest in the premises; that Hunter was in fact the owner of the note; that he had purchased the same after maturity; that upon his appointment as receiver he had expended a total sum of \$370.60 for repairs, telephone, custodian fees and insurance; that these expenses were proper charges under the provisions of the deed of trust; that the said principal sum of \$5000 was due and payable together with \$1507.56 interest (which represents all the interest from the date of the note), but found "the payment of \$150 interest is fairly established." Objections were filed to the master's report and overruled. Whereupon it was ordered that said objections stand as exceptions before the Chancellor. On a final hearing the exceptions were overruled and the decree herein was entered. The court allowed the said items of receiver's expenses; fixed and allowed complainant's solicitor's fee at \$600 and the receiver's fee at \$128.50. The cause is brought to

The appellant answered admitting the execution and delivery of the note and deed of trust, but denied that Carmack had any interest therein. He denied that the interest had been paid on the note, but alleged that interest had been paid from the date of the note to March 26, 1923; and alleged that appellant had set-off against the principal sum, by reason of an account it held against the said Tarrant for labor and repairs.

The said Everett Hunter also filed an answer in which he admitted, first, all the material allegations contained in the bill and only denied an interest by virtue of a sale to him under an execution against

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this court by appeal.

There are twenty-three assignments of error but not all of them are argued and we will discuss only those which we think are vital to a decision of the case. It is first contended that there is such a variance between the allegations of the bill and the proofs that there is no proper basis for the decree. This contention is grounded on the fact that the bill appears to have been filed by Brook, as trustee, and by Carmack, as beneficial owner of the note. The evidence discloses that Carmack had no interest in the subject matter and we observe no good reason why he was made a party to the suit. According to the allegations of the bill and according to the answer of Hunter, Carmack was the beneficial owner of the note. Hunter, in his answer, made no claim except that he was a purchaser at a sheriff's sale. But the undisputed proof shows that Hunter, and not Carmack, was the beneficial owner. This situation, however, does not affect the rights of appellant. The trustee did not need to join the beneficial owner with him as a party complainant. It was sufficient that the beneficial owner was a party. In the foreclosure of deeds of trust if the cestui que trustents or beneficial owners of the notes or bonds are numerous, they need not be made parties. (Land Company v. Peck, 112 Ill. 408, p. 435). But where the cestui que trustents or beneficial owners are not numerous they are necessary parties. (Rodman v. Quick, 211 Ill. 546; Odell v. Levy, 307 Ill. 277). All of the parties necessary to the foreclosure of the deed of trust in this case were before the court and the master therefore committed no error in admitting in evidence, the note and deed of trust.

Testimony was taken in an endeavor to show that Tarrant had become indebted to appellant for certain repair work, and that he and appellant had agreed that the note should be credited with the amount due for such work and that the same amounted to something over \$700. We have examined this testimony and are not disposed to differ with the master in his conclusion in rejecting such claim.

The Master committed a manifest error in the computation of interest. Appellee's attorney testified that he had computed the interest on

its court by appeal.

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decision of the case. It is first contended that there is such a
discrepancy between the allegations of the bill and the proofs that here
proper basis for the decree. This contention is grounded on the
fact that the bill appears to have been filed by "Brook, as trustee, and
Garwick, as beneficial owner of the note. The evidence discloses
that Garwick had no interest in the subject matter and we observe no
reason why he was made a party to the suit. According to the alle-
gations of the bill and according to the answer of Hunter, Garwick was
a beneficial owner of the note. Hunter, in his answer, made no claim
except that he was a purchaser at a sheriff's sale. But the undisputed
fact shows that Hunter, and no Garwick, was the beneficial owner.
The situation, however, does not affect the rights of appellant. The
fact did not need to join the beneficial owner with him as a party.
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The foreclosures of deeds of trust in the central one trustors or
beneficial owners of the notes or bonds are numerous, they need not be
parties. (Land Company v. Brook, 112 Ill. 408, 435). But where
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debtor to appellant in certain repair work, and that he and appellant
agreed that the note should be credited with the amount due for such
work and that the same amounted to something over \$700. We have examined
the testimony and are convinced that appellant is entitled to the
rejection of such claim.
The Master committed a manifest error in the computation of interest.

the note from its date to the date of the hearing and ~~xxx~~ that such interest amounted to \$1057.56 without allowing any deductions or payments. The master in making up his report inadvertently transposed two of the figures so that the amount of interest reported to be due was 1507.56 instead of \$1057.56. He also found that appellant had paid \$150 interest but the master failed to credit it. However, appellee, on October 19, 1925, remitted in this court the sum of \$499.10.

But we think there is a little doubt from the evidence that appellant was entitled to a credit of \$300 instead of \$150 on account of interest paid. The original bill alleged that the interest was unpaid since March 26, 1921, and the answer of Hunter admitted it. The president of the appellant company testified to payment of interest to said date. He produced a receipt therefor and Hunter produced a statement he had taken from Tarrant at the time he purchased the note, which statement recited that all interest was paid to March 26, 1921. The receipt offered by appellant showed that such interest had been paid in two semi-annual installments of \$150 each.

Appellant objects to the allowance of a fee of \$128.50 as receiver's compensation. Whether a receiver is entitled to compensation in such cases is generally a matter of discretion with the court. Usually compensation is allowed, but the question must be determined by the particular facts in each case. *Benneson v. Bill*, 62 Ill. 408; *Watson v. Cudney*, 144 Ill. App. 624; *Briggs v. Reynolds*, 176 Ill. App. 420). We cannot escape the conclusion that if the chancellor had been in possession of all of the facts as they were disclosed upon the taking of the testimony, he would not have appointed Hunter receiver. Hunter was a competitor of appellant and according to the testimony of the president of the appellant company, he entertained an unkind feeling for appellant. His conduct while in possession of the property indicates that he was reckless with regard to appellant's future, and we are forced to the conclusion, from the allegations in the bill, charging that Carmack owned the note and that Hunter's only interest was that of a subsequent purchaser, and from the allegations of Hunter's answer, in which he failed to disclose his true interest, that there was a studied

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design to conceal the true situation from the chancellor, to the end that Hunter might be appointed receiver without notice to appellant and put in possession of appellant's business and property. Under these circumstances we are disinclined to sanction the allowance of a fee to him.

We agree with the chancellor in his allowance of receiver's expenses. And while a fee of \$600 is a generous one for foreclosing a \$5000 mortgage, we are not disposed, under the circumstances of this case, to say there was any error in its allowance.

The chancellor, in entering the decree, did not accept as correct the interest calculations made by the master, but computed the interest from the date of the note to the date of the decree at six per cent, and found it to be \$1912.50. He then deducted one interest payment of \$150 and found the total amount of interest due to be \$1662.50. Counsel have argued the case upon the computations made by the master and not upon those made by the court. We have already pointed out that the proof conclusively showed appellant had made two payments of \$150 each. The decree was therefore erroneous in that it did not allow a further credit of \$150 for interest paid and also, in that it did allow a receiver's fee of \$128.50. These two amounts total \$278.50. In all other respects the findings of the chancellor were correct. The amounts erroneously included in the decree are less than the amount remitted in this court on motion of appellee. In view of this situation the decree should be affirmed.

Decree Affirmed.

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respects the findings of the chancellor were correct. The amounts

erroneously included in the decree are less than the amount remitted in
the court on motion of appellee. In view of this situation the decree
will be affirmed.

Decree Affirmed.

STATE OF ILLINOIS,)
SECOND DISTRICT.) ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
Mar in the year of our Lord one thousand
nine hundred and twenty- six.

Justus L. Johnson
Clerk of the Appellate Court.

Ernest Brook, as Trustee, etc.,
and W.A. Carmack,
Appellees,

v.

Pistakee Boat and Engine Co.,
et al, (Pistakee Boat and Engine
Co., Appellant).

: 241 I.A. 629
:
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: Appeal from
: Circuit Court
: of Lake County.

Jones R.J.

A decree for foreclosure and sale was entered by the circuit court of Lake County in favor of Ernest Brook, as trustee in a certain deed of trust and against the Pistakee Boat and Engine Company on April 16, 1925. The complainants in the bill, as filed March 5, 1923, were the said trustee and also one W.A. Carmack, who was alleged to be the owner of the note secured by the deed of trust. The bill alleges that the said Boat and Engine Company was indebted to Robert F. Tarrant in the sum of \$5,000 as evidenced by a certain promissory note dated March 26, 1919, executed by said company and payable to said Tarrant three years after date thereof, with interest thereon at 6% per annum, payable semi-annually; that said Tarrant transferred the note to Carmack for a valuable consideration; that said Carmack is the legal owner and holder thereof; and that the appellant was in default in the payment of principal and interest. Everett Hunter and certain other persons were made defendants as subsequent purchasers, mortgagees and judgment creditors. The bill prayed for an accounting between Carmack and the appellant, for the appointment of a receiver, for foreclosure and for general relief.

The mortgaged premises consisted of certain buildings and real property used by appellant in the manufacture and repair of boats. The deed of trust contained the usual provisions for accelerating the maturity of the note by reason of non-payment of interest, for the allowance of solicitor's fees,

and for the appointment of a receiver on motion of the complainant without notice and without bond.

The appellant answered admitting the execution and delivery of the note and deed of trust, but denied that Carmack had any interest therein, either as owner and holder, or otherwise; denied that the interest had not been paid on the note, but alleged that interest had been paid from the date of the note to March 26, 1923; and alleged that appellant had a set-off against the principal sum, by reason of an account it held against the said Tarrant for labor and repairs.

The said Everett Hunter also filed an answer in which he admitted, as true, all the material allegations contained in the bill and only claimed an interest by virtue of a sale to him under an execution against appellant.

On March 25, 1923, the court, on motion of complainants' solicitor, appointed the said Everett Hunter receiver of the mortgaged property without notice to appellant and without requiring any bond. A motion was made by appellant to vacate the said order which motion was denied, but an order was entered by the court permitting appellant to enter the premises upon giving bond in the sum of \$2500, which bond was given and appellant was restored to the possession of its property.

The cause was referred to a special master who took and reported the evidence together with his conclusions of fact and law. He found that Carmack had no interest in the premises; that Hunter was in fact the owner of the note; that he had purchased the same after maturity; that upon his appointment as receiver he had expended a total sum of \$370.60 for repairs, telephone, custodian fees and insurance; that these expenses were proper charges under the provisions of the deed of trust; that the said principal sum of \$5000 was due and payable together with \$1507.56 interest (which represents all the interest from the date of the note), but found "the payment of \$150 interest is fairly established." Objections

were filed to the master's report and overruled. Thereupon it was ordered that said objections stand as exceptions before the chancellor. On a final hearing the exceptions were overruled and the decree herein was entered. The court allowed the said items of receiver's expenses; fixed and allowed complainant's solicitor's fee at \$600 and the receiver's fee at \$128.50. The cause is brought to this court by appeal.

There are twenty-three assignments of error but not all of them are argued and we will discuss only those which we think are vital to a decision of the case. It is first contended that there is such a variance between the allegations of the bill and the proofs that there is no proper basis for the decree. This contention is grounded on the fact that the bill appears to have been filed by Brook, as trustee, and by Carmack, as beneficial owner of the note. The evidence discloses that Carmack had no interest in the subject matter and we observe no good reason why he was made a party to the suit. According to the allegations of the bill and according to the answer of Hunter, Carmack was the beneficial owner of the note. Hunter, in his answer, made no claim except that he was a purchaser at a sheriff's sale. But the undisputed proof shows that Hunter, and not Carmack, was the beneficial owner. This situation, however, does not affect the rights of appellant. The trustee did not need to join the beneficial owner with him as a party complainant. It was sufficient that the beneficial owner was a party. In the foreclosure of deeds of trust if the cestui que trustents or beneficial owners of the notes or bonds are numerous, they need not be made parties. (Land Company v. Beck 112 Ill. 408, p. 435). But where the cestui que trustents or beneficial owners are not numerous they are necessary parties. (Rodman v. Quick 211 Ill. 546; Odell v. Levi, 307 Ill. 277.) All of the parties necessary to the foreclosure of the deed of trust in this case were before the court and the master therefore committed no error in admitting in evidence, the note and deed of trust.

Testimony was taken in an endeavor to show that Tarrant had become indebted to appellant for certain repair work, and that he and appellant had agreed that the note should be credited with the amount due for such work and that the same amounted to something over \$700. We have examined this testimony and are not disposed to differ with the master in his conclusion in rejecting such claim.

The Master committed a manifest error in the computation of interest. Appellee's attorney testified that he had computed the interest on the note from its date to the date of the hearing and that such interest amounted to \$1057.80 without allowing any deductions or payments. The master in making up his report inadvertently transposed two of the figures so that the amount of interest he reported to be due was \$1507.80 instead of \$1057.56. He also found that appellant had paid \$150 interest but the master failed to credit it. However, appellee, on October 19, 1925, remitted in this court the sum of \$499.10.

But we think there is a little doubt from the evidence that appellant was entitled to a credit of \$300 instead of \$150 on account of interest paid. The original bill alleged that the interest was unpaid since March 26, 1921/^{and} the answer of Hunter admitted it. The president of the appellant company testified to payment of interest to said date. He produced a receipt therefor and Hunter produced a statement he had taken from Tarrant at the time he purchased the note, which statement recited that all interest was paid to March 26, 1921. The receipt offered by appellant showed that such interest had been paid in two semi-annual installments of \$150 each.

Appellant objects to the allowance of a fee of \$125.00 as receiver's compensation. Whether a receiver is entitled to compensation in such cases is generally a matter of discretion with the court. Usually compensation is allowed, but the question must be determined by the particular facts in each case.

(Dunnison v. Hill 62 Ill. 408; Watson v. Gudney, 144 Ill. 624; Briggs v. Reynolds, 176 Ill. 420.) We cannot escape the conclusion that if the chancellor had been in possession of all of the facts as they were disclosed upon the taking of the testimony, he would not have appointed Hunter receiver. Hunter was a competitor of appellant and according to the testimony of the president of the appellant company, he entertained an unkind feeling for appellant. His conduct while in possession of the property indicates that he was reckless with regard to appellant's future, and we are forced to the conclusion, from the allegations in the bill, charging that Carnack owned the note and that Hunter's only interest was that of a subsequent purchaser, and from the allegations of Hunter's answer, in which he failed to disclose his true interest, that there was a studied design to conceal the true situation from the chancellor, to the end that Hunter might be appointed receiver without notice to appellant and put in possession of appellant's business and property. Under these circumstances we are disinclined to sanction the allowance of a fee to him.

We agree with the chancellor in his allowance of receiver's expenses. And while a fee of \$600 is a generous one for foreclosing a \$5000 mortgage, we are not disposed, under the circumstances of this case, to say there was any error in its allowance.

The chancellor, in entering the decree, did not accept as correct the interest calculations made by the master, but computed the interest from the date of the note to the date of the decree at six per cent, and found it to be \$1812.50. He then deducted one interest payment of \$150 and found the total amount of interest due to be \$1662.50. Counsel have argued the case upon the computations made by the master and not upon those made by the court. We have already pointed out that the proof conclusively showed appellant had made two payments of \$150 each. The decree was therefore erroneous

in that it did not allow a further credit of \$150 for interest paid and also, in that it did allow a receiver's fee of \$455.50. These two amounts total \$3278.50. In all other respects the findings of the chancellor were correct. The amounts erroneously included in the decree are less than the amount remitted in this court on motion of appellee. In view of this situation the decree should be affirmed.

Decree Affirmed.

Abstract

AT A TERM OF THE APPELLATE COURT,

gun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 629

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 28 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Catherine Witterstetter
Appellee,

v.

Appeal from County
Court of Winnebago
County.

J. Frank Deuel,
Appellant

241 I. A. 629

Jones, P. J.

The appellee, Catherine Witterstetter, recovered a judgment against appellant J. Frank Deuel for \$300 in the county court of Winnebago County, from which judgment the appellant prosecutes this appeal.

On May 1, 1924, Catherine Witterstetter entered into a contract with the appellant for the purchase of a lot in the City of Rockford for \$1600. Mrs. Witterstetter signed the contract in German. The appellant affixed the abbreviation "Agt." after his signature. The contract provided for a cash payment of \$300 and a final payment of \$1300 upon the date of the delivery of the deed which was fixed on or before June 15, 1924. It also provided that the appellee should furnish an abstract showing a merchantable title.

Deuel was not the owner of the lot which he agreed to sell. It was a part of a tract of land owned by Jerome J. Soper and certain members of his family. Deuel had an option to buy it at the time he made the contract with appellee. For some reason not disclosed by the record he was unable to obtain a deed to the premises and the transaction with appellee was delayed. The major portion of the business of Mrs. Witterstetter was transacted by her daughter who was able to speak better English. Deuel asked the daughter for an extension of time in which to close the deal, and according to her version such time was extended to June 30th, but according to the testimony of Deuel it was extended to July 15, 1924. During this time appellee left Rockford on a visit and entrusted the business to her daughter. Prior to her departure

Appeal from County
Court of Winnebago
County.

Catherine Witterstetter
Appellee,

v.

J. Frank Denel,
Appellant

241 I.A. 629

The appellee, Catherine Witterstetter, recovered a judgment against appellant J. Frank Denel for \$800 in the county court of Winnebago County, from which judgment the appellant prosecutes this appeal.

On May 1, 1924, Catherine Witterstetter entered into a contract with the appellant for the purchase of a lot in the City of Rockford for \$1600. Mrs. Witterstetter signed the contract in German. The appellant affixed the abbreviation "Agt." after his signature. The contract provided for a cash payment of \$800 and a final payment of \$1800 upon the date of the delivery of the deed which was made on or before June 15, 1924. It also provided that the appellee should furnish an abstract showing a merchantable title. Denel was not the owner of the lot which he agreed to sell. It was a part of a tract of land owned by Jerome J. Joppy and certain members of his family. Denel had an option to buy it at the time he made the contract with appellee. For some reason not disclosed by the record he was unable to obtain a deed to the premises and the transaction with appellee was delayed. The major portion of the business of Mrs. Witterstetter was transacted by her daughter who was able to speak better English. Denel asked the appellee for an extension of time in which to close the deal, and according to the version such time was extended to June 30th, but according to the testimony of Denel it was extended to July 15.

During this time appellee left Rockford on a visit and entered the business to her daughter. Prior to her departure

appellee purchased a cashier's check for \$1300 and endorsed the same on the back. She delivered this check to her daughter to make the final payment. The daughter went to Duell's office and at other times talked with him over the 'phone. She says she informed him that she had the money with which to make the final payment and requested a delivery of the deed and abstract, but appellant put her off by saying that the land was to be subdivided and he wanted the matter delayed so that he could use a more accurate description in the deed.

On July 14, 1924, appellee served a notice on appellant to the effect that she had elected to declare the contract terminated because of his failure to perform as he had agreed to do and demanded a return of the \$300 which had been paid by her. The next day appellant sent a lawyer to the home of appellee with a deed. The abstract was not completed until the day following. Appellee's daughter acting for her mother, refused to accept the deed and this suit in assumpsit followed.

Whether the time for the delivery of the deed was extended to June 30th or to July 15th was a question of fact to be determined by the jury and this question was resolved in favor of appellee. It therefore follows that appellant was in default in the performance of his duties under the contract and that appellee had a right to terminate the contract upon her offer to perform. We have examined the testimony and think there is no doubt about the sufficiency of her offer to accept a deed and to make the final payment in accordance with the provisions of the contract. The verdict is well supported by the testimony and for that reason the judgment of the trial court is affirmed.

Judgment Affirmed.

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other times talked with him over the phone. She says she informed
him that she had the money with which to make the final payment and
requested a delivery of the deed and abstract, but appellee put
her off by saying that the land was to be subdivided and he wished
the matter delayed so that he could use a more accurate description
of the deed.

On July 14, 1934, appellee served a notice on appellant to
the effect that she had elected to declare the contract terminated
because of his failure to perform as he had agreed to do and
demanded a return of the \$1300 which had been paid by her. The next
day appellee sent a lawyer to the home of appellee with a deed.
The abstract was not completed until the day following. Appellee's
daughter acting for her mother, refused to accept the deed and this

in summary follows:
Whether the time for the delivery of the deed was extended to
30th or to July 15th was a question of fact to be determined
by the jury and this question was resolved in favor of appellee.
Therefore follows that appellant was in default in the performance
of his duties under the contract and that appellee had a right to
terminate the contract upon her offer to perform. We have examined
the testimony and think there is no doubt about the sufficiency of
her offer to accept a deed and to make the final payment in accordance
with the provisions of the contract. The verdict is well supported
by the testimony and for that reason the judgment of the trial court

Judgment Affirmed.

STATE OF ILLINOIS,) ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court.
SECOND DISTRICT.)
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
to hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
mar, in the year of our Lord one thousand
nine hundred and twenty- six,

Justus L. Johnson
Clerk of the Appellate Court.

Catharine Witterstetter, :
 Appellee, :
 v. : Appeal from County
 : Court of Winnebago
 : County.
 J. Frank Deuel, :
 Appellant, :

241 I.A. 29

Jones P.J.

The appellee, Catharine Witterstetter, recovered a judgment against appellant J. Frank Deuel for \$300 in the county court of Winnebago County, from which judgment the appellant prosecutes this appeal.

On May 1, 1924, Catharine Witterstetter entered into a contract with the appellant for the purchase of a lot in the City of Rockford for \$1600. Mrs. Witterstetter signed the contract in German. The appellant affixed the abbreviation "Agt." after his signature. The contract provided for a cash payment of \$300 and a final payment of \$1300 upon the date of the delivery of the deed which was fixed on or before June 15, 1924. It also provided that the appellee should furnish an abstract showing a merchantable title.

Deuel was not the owner of the lot which he agreed to sell. It was a part of a tract of land owned by Jerome J. Soper and certain members of his family. Deuel had an option to buy it at the time he made the contract with appellee. For some reason not disclosed by the record he was unable to obtain a deed to the premises and the transaction with appellee was delayed. The major portion of the business of Mrs. Witterstetter was transacted by her daughter who was able to speak better English. Deuel asked the daughter for an extension of time in which to close the deal, and according to her version

such time was extended to June 30th, but according to the testimony of Deuel it was extended to July 15, 1924. During this time appellee left Rockford on a visit and entrusted the business to her daughter. Prior to her departure appellee purchased a cashier's check for \$1300 and endorsed the same on the back. She delivered this check to her daughter to make the final payment. The daughter went to Deuel's office and at other times talked with him over the 'phone. She says she informed him that she had the money with which to make the final payment and requested a delivery of the deed and abstract, but appellant put her off by saying that the land was to be subdivided and he wanted the matter delayed so that he could use a more accurate description in the deed.

On July 14, 1924, appellee served a notice on appellant to the effect that she had elected to declare the contract terminated because of his failure to perform as he had agreed to do and demanded a return of the \$300 which had been paid by her. The next day appellant sent a lawyer to the home of appellee with a deed. The abstract was not completed until the day following. Appellee's daughter acting for her mother, refused to accept the deed and this suit in assumpsit followed.

Whether the time for the delivery of the deed was extended to June 30th or to July 15th was a question of fact to be determined by the jury and this question was resolved in favor of appellee. It therefore follows that appellant was in default in the performance of his duties under the contract and that appellee had a right to terminate the contract upon her offer to perform. We have examined the testimony and think there is no doubt about the sufficiency of her offer to accept a deed and

to make the final payment in accordance with the provisions of the contract. The verdict is well supported by the testimony and for that reason the judgment of the trial court is affirmed.

Judgment Affirmed.

Abstract

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 629

present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 29 1925 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Ursula Pauline, Admrx. of the
estate of Joe Pauline, deceased,
Appellant,

vs.

241 I.A. 629

Appeal from Circuit
Court of Bureau County.

Chicago, Rock Island, & Pacific
Railway Company, a corporation,
Appellee,

Jones P. J.

This is an action for personal injuries in which the jury returned a verdict in favor of the defendant railroad company. Judgment was rendered upon the verdict and the cause brought here by appeal. It is contended that the judgment should be reversed and remanded for the following reasons:- The verdict is contrary to the evidence; the court admitted improper testimony of the witnesses Spaulding and Zeering; the court admitted photographs taken 14 months after the date of the accident and when, it is asserted, the locus in quo was not the same, and erred in the giving and refusal of instructions.

Joe Pauline and John Koss were partners in the meat market and grocery business in De Pue, Illinois and about 8:25 o'clock on the night of November 20, 1923, they were engaged in delivering butter and other articles sold at their place of business. For the purpose of making delivery they were using a Ford truck which had a cab in front where the men were seated. Koss was driving. The railroad right of way runs east and west. It is intersected by a street running north and south known as East Street. A short distance south of the right of way and running through the business section of De Pue is a street known as Fourth Street which leads into East street from the east. The general direction of Fourth Street is parallel with the railroad tracks. East street is a much travelled highway. Between Fourth Street and the railroad right of way are

241 I. A. 629

Appeal from Circuit
Court of Green County.Pauline Pauline, Adminr. of the
Estate of Joe Pauline, deceased,
Appellant,

vs.

Chicago, Rock Island, & Pacific
Railway Company, a corporation,
Appellee.

James P. J.

This is an action for personal injuries in which the jury returned a verdict in favor of the defendant railway company. Judgment was rendered upon the verdict and the cause brought here by appeal. It is contended that the judgment should be reversed and set aside for the following reasons:— The verdict is contrary to the evidence; the court admitted improper testimony of the witnesses Pauline and Seering; the court admitted photographs taken 14 months after the date of the accident and when, it is asserted, the persons in question were not the same, and erred in the giving and refusal of instructions.

Joe Pauline and John Koss were taxicab drivers in the west market and grocery business in De Pue, Illinois and about 8:25 o'clock on the night of November 20, 1923, they were engaged in carrying butter and other articles sold at their place of business. For the purpose of making delivery they were using a Ford truck which had a cab in front where the men were seated. Koss was driving. The railroad track of way runs east and west. It is intersected by a street running north and south known as East Street. A short distance of the right of way and running through the business section of De Pue is a street known as North Street which leads into East Street from the east. The general direction of North Street is parallel with the railroad tracks. East street is a road travelled between North Street and the railroad right of way are

located certain buildings. The intersection of East Street and the railroad tracks is known as Sullivan's crossing and considerably east thereof is the railroad station. There are several sets of tracks about this location including the main track, the east bound track which is south of the main track, and the west bound track which is north of the main track. The railway company maintains a flagman at Sullivan's crossing. The evidence on the part of plaintiff tended to show that the decedent and his partner came along Fourth Street going west and turned into East Street going north across the railroad tracks; that the flagman signalled them to go ahead over the tracks; that the view of the decedent and his partner toward the east was partially obstructed by certain buildings; that at the time of the accident there was a passenger train coming from the west; that the headlight of the engine of said train was plainly visible; that as Pauline was crossing the west bound track the automobile was struck by a train coming from the east at a rate of speed between 50 and 60 miles per hour; that there was an ordinance of said town limiting the rate of speed of trains within the corporate limits to 10 miles per hour; and that no bell or whistle was sounded by the approaching train from the east.

On the other hand the evidence offered on behalf of the defendant tended to show that the view of those in the automobile toward the east was not obstructed; that from a point 35 feet south of the south track an unobstructed view of over 1000 feet could be had; that the decedent came from the east and saw the headlight on the local passenger train coming from the west; that he and his companion hastened to cross the tracks in front of said train from the west without looking to the east and that as a result they did not notice the approaching train which struck them. It also tended to show that the flagman instead of signalling them to cross the tracks, waved to them to stop.

The question of due care and contributory negligence is one

of fact for the jury (Milauskis v. T.R. Assn. 286 Ill. 547) and we feel, after a very careful examination of the record, that the finding against the plaintiff with reference to due care and contributory negligence was entirely justified.

The court admitted the testimony of the witnesses Spaulding and Searing, who went to Sullivan's crossing one night during the progress of the trial and made tests as to the distance an unobstructed view could be had east from a given point at Sullivan's crossing. It is objected that this testimony was improper because the conditions were not the same as they were at the time of the accident and that the two witnesses were men of local prominence and because thereof their testimony was given undue weight and credit by the jury. We think neither objection is well grounded. In order to admit evidence of experiments made out of court, there must be a substantial similarity between the conditions surrounding the experiment and those existing at the time of the occurrence. (Wigmore's Evidence Vol. 1 p. 781, 2nd Ed.) Any minor variation from the conditions at the time of the occurrence, affects the weight rather than the admissibility of the evidence. (People v. Pfenschmidt 262 Ill. 411.) There was evidence which strongly tended to show that the situation, so far as it concerned the view, was substantially the same at the time of the trial as it was at the time of the accident. Certainly defendant is not to be criticised for calling witnesses of the highest respectability to prove a fact in issue. We believe the court did not err in admitting the photographs which were taken about fourteen months after the accident. If, as the evidence tended to show, the situation had virtually remained unchanged, it was proper to admit them.

The court refused three instructions which were tendered by the plaintiff. The 19th instruction was on the question of the physical construction of Sullivan's crossing. One count in the declaration charges that this crossing was not maintained in compliance with the statute but there is no evidence whatever in the

of fact for the jury (Milwaukee v. W.R. Aasen, 286 Ill. 547) and we
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The court admitted the testimony of the witnesses spanning
the hearing, who went to Sullivan's crossing one night during the
course of the trial and made tests as to the distance an unob-
structed view could be had east from a given point at Sullivan's
crossing. It is objected that this testimony was improper because
the conditions were not the same as they were at the time of the
accident and that the two witnesses were men of local prominence
because thereof their testimony was given undue weight and credit
by the jury. We think neither objection is well grounded. In order
to admit evidence of experiments made out of court, there must be
substantial similarity between the conditions surrounding the experi-
ment and those existing at the time of the occurrence. (Wigmore's
Evidence Vol. 1 p. 781, 2nd Ed.) Any minor variation from the
conditions at the time of the occurrence, affects the weight rather
than the admissibility of the evidence. (People v. Fenschmidt 282
Ill. 411.) There was evidence which strongly tended to show that
the situation so far as it concerned the view, was substantially
the same at the time of the trial as it was at the time of the acci-
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witnesses of the highest respectability to prove a fact in issue.
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were taken about fourteen months after the accident. If, as the
court tended to show, the situation had virtually remained
the same, it was proper to admit them.

The court refused three instructions which were tendered by
the plaintiff. The last instruction was on the question of the
contributory negligence of Sullivan's crossing. One count in the
complaint charges that this crossing was not maintained in con-
formity with the statute but there is no evidence whatever in the

record in support of it. Therefore there was nothing on which to base the said instruction and the court properly refused it. ~~Therefore there was nothing on which to base the said instruction and the court properly refused it.~~ The 20th instruction was with reference to speed and the giving of a signal by ringing a bell or blowing a whistle. The 21st instruction set forth the ordinance which limited the speed to 10 miles per hour within the corporate limits. The 2nd and 4th instructions offered on behalf of plaintiff were given and covered the same subject matters as the 20th and 21st instructions. The court therefore committed no error in refusing the said three instructions.

Appellee submitted to the court nine instructions and all of them were given. These instructions were numbered 7 to 15 inclusive. Four of them told the jury that if they believed that a certain state of facts existed, then "your verdict must be for the defendant, not guilty." It is claimed by appellant that the practice of closing a large number of instructions with the words "Then you should find the defendant not guilty" or with equivalent words has been held to constitute reversible error. (Cohen v. Weinstein 251 Ill. App. 84; Nelson v. Chicago City Ry. Co. 165 Ill. App. 98; Wood v. Illinois Central Ry. Co. 185 Ill. App. 180.) We are not inclined to interpret the opinions in those cases as laying down any invariable rule. Whether or not an infraction of the rule against the use of such language constitutes reversible error, must depend upon the particular facts of each case. It too frequently occurs that lawyers attempt to employ instructions as a vehicle for argument. Under this practice a series of instructions are often submitted ending in the words above mentioned or in the words "You must find the issues in favor of the plaintiff." or "You must find the issues in favor of the defendant." The adverse criticism of the too frequent use of such language is richly deserved.

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4, *Nelson v. Chicago City Ry. Co.* 183 Ill. App. 28; *Wood v.*

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particular facts of each case. It too frequently occurs that lawyers

attempt to employ instructions as a vehicle for argument. Under this

practice a series of instructions are often submitted ending in the

words above mentioned or in the words "You must find the issues in

favor of the plaintiff," or "You must find the issues in favor of

the defendant." The adverse criticism of the too frequent use of such

language is richly deserved.

Complaint is made of the 10th, 13th, 14th and 15th instructions because they state that, if plaintiff's intestate was guilty of negligence which "materially" contributed to his death, there can be no recovery. It is urged that such instructions should have required the contributory negligence to have been the proximate or efficient cause of the death and not the material ~~one~~ ^{cause}. There is no doubt that courts have put the stamp of approval upon the words "proximate" and "efficient" when used in such connection. Appellee's eleventh instruction did use the word proximately and it should have been used in all other instructions instead of the word materially. In Consolidated Coal Company of St. Louis v. Bokamp 181 Ill. 9, the court refused to give an instruction which stated that if the plaintiff did any careless or negligent act which "materially contributed" to his injury, he could not recover. But the use of the word materially in that instruction was not condemned because it was used as a synonym for proximately or efficiently, but because its substance was contained in other given instructions. Appellant relies on C. C. Ry. Co. v. Donnelly 136 Ill. App. 204 as supporting her contention. But we do not construe the opinion in that way. In the discussion of the term "materially contributing" the court, in effect, stated that since the doctrine of comparative negligence no longer prevails in this state it was not true that "proximately contributing" is the same thing as "materially contributing" and that such an instruction is erroneous because it requires proof of a different degree of negligence than the law requires. It is now the rule that any negligence, whether the same be material, gross or even slight, which proximately contributes to the cause of the injury, will prevent a recovery by the plaintiff and it was therefore error in that case to instruct the jury that the plaintiff would be entitled to recover if his own carelessness did not materially contribute to the injury. The same reasoning was laid down in St. Louis National Stock Yards v. Godfrey 198 Ill. 288. We do not intend to justify

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because they state that, if plaintiff's intestate was guilty of negligence which "materially contributed to his death, there can be no recovery. It is urged that such instructions should have required the contributory negligence to have been the proximate or efficient cause of the death and not the material. There is no doubt that courts have put the stamp of approval upon the words "proximate" and "efficient" when used in such connection. Appellate's eleventh instruction did use the word proximately and it should have been used in all other instructions instead of the word material. In Consolidated Coal Company of St. Louis v. Bokamp 181 Ill. 2, the court refused to give an instruction which stated that if the plaintiff did any careless or negligent act which "materially contributed to his injury, he could not recover. But the use of the word materially in that instruction was not condemned because it was used as a synonym for proximately or efficiently, but because its substance was contained in other given instructions. Appellant relies on O. & Ry. Co. v. Donnelly 125 Ill. App. 204 as supporting her contention. But we do not construe the opinion in that way. In the discussion of the term "materially contributed" the court, in effect, stated that since the doctrine of comparative negligence no longer prevails in this state it was not true that "proximately contributing" is the same thing as "materially contributing" and that such an instruction is erroneous because it requires proof of a different degree of negligence than the law requires. It is now the rule that negligence, whether the same be material, gross or even slight, which proximately contributes to the cause of the injury, will prevent a recovery by the plaintiff and it was therefore error in this case to instruct the jury that the plaintiff would be entitled to recover if his own carelessness did not materially contribute to his injury. The same reasoning was laid down in St. Louis National Bank v. Godfrey 128 Ill. 288. We do not intend to justify

the use of the word "materially" as it was employed in appellee's instructions, because it obviously imposes a different standard of proof than that which prevails under the law and in some cases might not include the proximate cause.

The tenth instruction is as follows: "The jury is instructed that the term 'contributory negligence' as used in these instructions referring to the deceased Joe Pauline, is such conduct, if any, on the part of Joe Pauline as you may believe from the evidence, materially contributed to cause the accident which resulted in his death; and if the jury believe from the evidence that said Joe Pauline was guilty of any such contributory negligence or conduct which contributed to cause the accident which resulted in his death, in such case the plaintiff cannot recover, and your verdict must be for the defendant, not guilty." It will be observed that this instruction attempts to define the term "contributory negligence." When analyzed, it states that for contributory negligence to constitute a defense, it must have materially contributed to the cause of the accident. It imposed a higher standard of proof upon the appellee than the law imposed upon it. It was capable of being detrimental rather than beneficial to appellee. At any rate we are of the opinion that it did not prejudicially affect appellant. Webster's New International Dictionary gives weighty and essential as synonyms of material. It will be seen at a glance that if an instruction requires the contributory negligence to be a weighty cause or the essential cause of the accident, it would require more than the legal rule requires.

There is no doubt that the contributory negligence which prevents a recovery must be the proximate cause of the injury, and the jury were so told in the 11th instruction given on behalf of appellee. Appellee's instructions are criticised in other respects but we have called attention to the substantial objections and a further discussion is not necessary.

Were it not for our firm conviction that the verdict of the

jury was in strict conformity with the facts in the case as shown by the evidence, we would be quite reluctant in affirming this judgment, in view of the inaccuracy of the instructions given on behalf of appellee. Because of our feeling that the verdict is right upon the evidence, we are disinclined to reverse the judgment. Where substantial justice has been done, courts will not reverse a cause on account of error in instructions. (Newkirk v. Cone 18 Ill. 449; Pridmore v. C.R.I. & P. Ry. Co. 275 Ill. 286; Eshelman v. Revolt 220 Ill. App. 69.)

Believing that the verdict was unaffected by the erroneous instructions and that it was the only verdict the evidence would warrant, the judgment is affirmed.

Judgment Affirmed.

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on account of error in instructions. (Newkirk v. Cono 18 Ill. 449;
Adams v. O.R.I. & E. Ry. Co. 275 Ill. 386; Behlman v. Hewitt
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Believing that the verdict was unaffected by the erroneous
instructions and that it was the only verdict the evidence would
warrant, the judgment is affirmed.
Judgment Affirmed.

STATE OF ILLINOIS,) ss. I. JUSTUS L. JOHNSON, Clerk of the Appellate Court.
SECOND DISTRICT.)
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
to hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

Ursula Pauline, Admrx. of the
estate of Joe Pauline, deceased,
Appellant,

vs.

Chicago, Rock Island, & Pacific
Railway Company, a corporation,
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241 I.A. 29

Jones P.J.

This is an action for personal injuries in which the jury returned a verdict in favor of the defendant railroad company. Judgment was rendered upon the verdict and the cause brought here by appeal. It is contended that the judgment should be reversed and remanded for the following reasons:- The verdict is contrary to the evidence; the court admitted improper testimony of the witnesses Spaulding and Zearing; the court admitted photographs taken 14 months after the date of the accident and when, it is asserted, the locus in quo was not the same, and erred in the giving and refusal of instructions.

Joe Pauline and John Koss were partners in the meat market and grocery business in De Pue, Illinois and about 8:25 o'clock on the night of November 20, 1923, they were engaged in delivering butter and other articles sold at their place of business. For the purpose of making delivery they were using a Ford truck which had a cab in front where the men were seated. Koss was driving. The railroad right of way runs east and west. It is intersected by a street running north and south known as East Street. A short distance south of the right of way and running through the business section of De Pue is a street known as Fourth Street which leads into East street from the east. The general direction of Fourth Street is parallel / ^{with} the railroad tracks. East Street is a much travelled highway. Between Fourth Street and the rail-

road right of way are located certain buildings. The intersection of East Street and the railroad tracks is known as Sullivan's crossing and considerably east thereof is the railroad station. There are several sets of tracks about this location including the main track, the east bound track which is south of the main track, and the west bound track which is north of the main track. The railway company maintains a flagman at Sullivan's crossing. The evidence on the part of plaintiff tended to show that the decedent and his partner came along Fourth Street going west and turned into East Street going north across the railroad tracks; that the flagman signalled them to go ahead over the tracks; that the view of the decedent and his partner toward the east was partially obstructed by certain buildings; that at the time of the accident there was a passenger train coming from the west; that the headlight of the engine of said train was plainly visible; that as Pauline was crossing the west bound track the automobile was struck by a train coming from the east at a rate of speed between 50 and 60 miles per hour; that there was an ordinance of said town limiting the rate of speed of trains within the corporate limits to 10 miles per hour; and that no bell or whistle was sounded by the approaching train from the east.

On the other hand the evidence offered on behalf of the defendant tended to show that the view of those in the automobile toward the east was not obstructed; that from a point 35 feet south of the south track an unobstructed view of over 1000 feet could be had; that the decedent came from the east and saw the headlight on the local passenger train coming from the west; that he and his companion hastened to cross the tracks in front of said train from the west without looking to the east and that as a result they did not notice the approaching train which struck them. It also tended to show that the flagman instead of signalling them to cross the tracks, waved to them to stop.

The question of due care and contributory negligence is one of fact for the jury (*Milauskis v. T.R. Assn.* 286 Ill. 547) and we feel, after a very careful examination of the record, that the finding against the plaintiff with reference to due care and contributory negligence was entirely justified.

The court admitted the testimony of the witnesses Spaulding and Bearing, who went to Sullivan's crossing one night during the progress of the trial and made tests as to the distance an unobstructed view could be had east from a given point at Sullivan's crossing. It is objected that this testimony was improper because the conditions were not the same as they were at the time of the accident and that the two witnesses were men of local prominence and because thereof their testimony was given undue weight and credit by the jury. We think neither objection is well grounded. In order to admit evidence of experiments made out of court, there must be a substantial similarity between the conditions surrounding the experiment and those existing at the time of the occurrence. (*Wigmore's Evidence* Vol. 1 p. 781, 2nd Ed.) Any minor variation from the conditions at the time of the occurrence, affects the weight rather than the admissibility of the evidence. (*People v. Pfanschmidt* 283 Ill. 411.) There was evidence which strongly tended to show that the situation, so far as it concerned the view, was substantially the same at the time of the trial as it was at the time of the accident. Certainly defendant is not to be criticised for calling witnesses of the highest respectability to prove a fact in issue. We believe the court did not err in admitting the photographs which were taken about fourteen months after the accident. If, as the evidence tended to show, the situation had virtually remained unchanged, it was proper to admit them.

The court refused three instructions which were tendered by the plaintiff. The 19th instruction was on the question of the physical construction of Sullivan's crossing. One count in the declaration charges that this crossing was

not maintained in compliance with the statute but there is no evidence whatever in the record in support of it. Therefore there was nothing on which to base the said instruction and the court properly refused it. The 20th instruction was with reference to speed and the giving of a signal by ringing a bell or blowing a whistle. The 21st instruction set forth the ordinance which limited the speed to 10 miles per hour within the corporate limits. The 2nd and 4th instructions offered on behalf of plaintiff were given and covered the same subject matters as the 20th and 21st instructions. The court therefore committed no error in refusing the said three instructions.

Appellee submitted to the court nine instructions and all of them were given. These instructions were numbered 7 to 15 inclusive. Four of them told the jury that if they believed that a certain state of facts existed, then "your verdict must be for the defendant, not guilty". It is claimed by appellant that the practice of closing a large number of instructions with the words "Then you should find the defendant not guilty" or with equivalent words has been held to constitute reversible error. (Cohen v. Weinstein 231 Ill. App. 84; Nelson v. Chicago City Ry. Co. 163 Ill. App. 98; Wood v. Illinois Central Ry. Co. 185 Ill. App. 180.) We are not inclined to interpret the opinions in those cases as laying down any invariable rule. Whether or not an infraction of the rule against the use of such language constitutes reversible error, must depend upon the particular facts of each case. It too frequently occurs that lawyers attempt to employ instructions as a vehicle for argument. Under this practice a series of instructions are often submitted ending in the words above mentioned or in the words "You must find the issues in favor of the plaintiff." or "You must find the issues in favor of the defendant." The adverse criticism of the too frequent use of such language is richly deserved.

Complaint is made of the 10th, 13th, 14th and 15th instructions because they state that, if plaintiff's intestate was guilty of negligence which "materially" contributed to his death, there can be no recovery. It is urged that such instructions should have required the contributory negligence to have been the proximate or efficient cause of the death and not the material cause. There is no doubt that courts have put the stamp of approval upon the words "proximate" and "efficient" when used in such connection. Appellee's eleventh instruction did use the word proximately and it should have been used in all other instructions instead of the word materially. In Consolidated Coal Company of St. Louis v. Bokamp 181 Ill. 9, the court refused to give an instruction which stated that if the plaintiff did any careless or negligent act which "materially contributed" to his injury, he could not recover. But the use of the word materially in that instruction was not condemned because it was used as a synonym for proximately or efficiently, but because its substance was contained in other given instructions. Appellant relies on C.C. Ry. Co. v. Donnelly 136 Ill. App. 204 as supporting her contention. But we do not construe the opinion in that way. In the discussion of the term "materially contributing" the court, in effect, stated that since the doctrine of comparative negligence no longer prevails in this state it was ^{not} true that "proximately contributing" is the same thing as "materially contributing" and that such an instruction is erroneous because it requires proof of a different degree of negligence than the law requires. It is now the rule that any negligence, whether the same be material, gross or even slight, which proximately contributes to the cause of the injury, will prevent a recovery by the plaintiff and it was therefore error ^{in that case} to instruct the jury that the plaintiff would be entitled to recover if his own carelessness did not materially contribute to the injury. The same reasoning was laid down in St. Louis National Stock Yards v. Godfrey 193 Ill. 288. We do not intend to justify the use of the word "materially"

as it was employed in appellee's instructions, because it obviously imposes a different standard of proof than that which prevails under the law and in some cases might not include the proximate cause.

The tenth instruction is as follows: "The jury is instructed that the term 'contributory negligence' as used in these instructions referring to the deceased Joe Pauline, is such conduct, if any, on the part of Joe Pauline as you may believe from the evidence, materially contributed to cause the accident which resulted in his death; and if the jury believe from the evidence that said Joe Pauline was guilty of any such contributory negligence or conduct which contributed to cause the accident which resulted in his death, in such case the plaintiff cannot recover, and your verdict must be for the defendant, not guilty." It will be observed that this instruction attempts to define the term "contributory negligence". When analyzed, it states that for contributory negligence to constitute a defense, it must have materially contributed to the cause of the accident. It imposed a higher standard of proof upon the appellee than the law imposed upon it. It was capable of being detrimental rather than beneficial to appellee. At any rate we are of the opinion that it did not prejudicially affect appellant. Webster's New International Dictionary gives weighty and essential as synonyms of material. It will be seen at a glance that if an instruction requires the contributory negligence to be a weighty cause or the essential cause of the accident, it would require more than the legal rule requires.

There is no doubt that the contributory negligence which prevents a recovery must be the proximate cause of the injury, and the jury were so told in the 11th instruction given on behalf of appellee.

Appellee's instructions are criticised in other respects but we have called attention to the substantial objections and a

further discussion is not necessary.

Were it not for our firm conviction that the verdict of the jury was in strict conformity with the facts in the case as shown by the evidence, we would be quite reluctant in affirming this judgment, in view of the inaccuracy of the instructions given on behalf of appellee. Because of our feeling that the verdict is right upon the evidence, we are disinclined to reverse the judgment. Where substantial justice has been done, courts will not reverse a cause on account of error in instructions. (Newkirk v. Cone 18 Ill. 449; Pridmore v. C.R.I. & N. Ry. Co. 275 Ill. 386; Eshelman v. Rawalt 220 Ill. App. 69.)

Believing that the verdict was unaffected by the erroneous instructions and that it was the only verdict the evidence would warrant, the judgment is affirmed.

Judgment Affirmed.

Abstract

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

241 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Journal of Management Education 30(6)

1

October Term A. D. 1925

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9.

The People of the State of
Illinois ex rel Loretta Clark,

Appellee,

vs.

Marcus Keys,

Appellant

.241 I.A. 630

Appeal from the
County Court of
La Salle County.

Jett, J.

This is an appeal from the judgment of the County Court of La Salle county, obtained on the 27th day of December, 1925, in favor of the People Ex Rel Loretta Clark, appellee against Marcus Keys, appellant, in a bastardy proceeding.

A jury trial was had resulting in a finding to the effect that the appellant, Marcus Keys, was the father of the bastard child of Loretta Clark. Motions for a new trial and in arrest of judgment were made and denied. Judgment was rendered on the verdict for \$1100. to be paid in quarterly installments, of which \$425.00 to cover the first three and one fourth years, was past due.

The complaint is in the usual form in such cases. A warrant was issued, appellant arrested and bound over as provided by statute.

The appellant contends that the judgment of the county court should be reversed for the following reasons:

FIRST. It was error for the trial judge to deny the defendant's motion for a continuance of the cause on account of the absence of a material witness.

SECOND. There was no issue presented by way of forming an issue of fact, as provided by the statute, at the next term after which the bond and transcript of the preliminary hearing were filed in the County Court, nor was there any arraignment of the defendant had, or plea entered, and therefore the subsequent proceedings were and are a nullity.

In view of the conclusion we have reached, it is unnecessary

The People of the State of
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241 I.A. 630

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A jury trial was had resulting in a finding to the effect that the appellant, Marcus Keys, was the father of the bastard child Loretta Clark. Motions for a new trial and in arrest of judgment were made and denied. Judgment was rendered on the verdict for \$1100.00 to be paid in quarterly installments, of which \$485.00 to cover the last three and one fourth years, was past due.

The complaint is in the usual form in such cases. A warrant was issued, appellant arrested and bound over as provided by statute. The appellant contends that the judgment of the county court is erroneous.

FIRST. It was error for the trial judge to deny the defendant's motion for a continuance of the case on account of the absence of a material witness.

SECOND. There was no issue presented by way of finding on facts as provided by the statute, at the next term after the bond and transcript of the preliminary hearing were filed in the County Court, nor was there any arraignment of the defendant, nor plea entered, and therefore the subsequent proceedings were a nullity.

In view of the conclusion we have reached, it is unnecessary

for us to review the evidence, or express an opinion concerning it, for the reason that the reversal is based upon matters not pertaining to the evidence heard on the trial of the cause.

The first reason argued for a reversal is that the court erred in refusing to grant appellant's motion for a continuance. From what is disclosed by the affidavit filed in support of the motion the witness Paul Jones was a material one. We have examined the affidavit carefully, and to our minds it is unusually complete and full in all matters of substance, and complies with the requirements as to form. The matters and things that it is claimed could be proven by the absent witness were very material on the part of the appellant, upon the trial of this cause. The testimony which the appellant sought to prove by the absent witness is of such importance to him, that it appears to us he was prejudiced in not being able to obtain a continuance.

It is next insisted that the court erred by proceeding with the trial without an issue being made up, as provided by the statute, and with no plea being entered by or on behalf of the defendant.

A proceeding under Chapter 17 of the Statute has always been classed among criminal cases. *Kelly vs The People*, 29 Ill. 287-290. Section 4, Chapter 17, Cahill's Statute, among other things provides "The Court at its next term (meaning the next term after the defendant has been bound over to the county court), shall cause an issue to be made up, whether the person charged as aforesaid, is the real father of the child or not, which issue shall be tried by a jury.

In discussing the question of practice in such cases, in *Monney vs The People*, 96 Ill. App. 622, on page 626 the following language was used:- "The court having therefore properly, although informally disposed of the so-called plea in statement, it was its duty as required by the statute to cause an issue to be made up, whether appellant, the person charged, was the real father of the child or not, and cause such issue to be tried by a jury. How, and in what manner shall the issue be made up?

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It is next insisted that the court erred by proceeding with the trial without an issue being made up, as provided by the statute, and with no plea being entered by or on behalf of the defendant.

A proceeding under Chapter IV of the Statute has always been classified among criminal cases. Kelly vs The People, 22 Ill. 287-288. Section 4, Chapter IV, Cahill's Statute, among other things provides "The Court at its next term (meaning the next term after the defendant has been bound over to the county court), shall cause an issue to be made up, whether the person charged as aforesaid, is the real father of the child or not, which issue shall be tried by a jury.

In discussing the question of practice in such cases, in *People vs The People*, 96 Ill. App. 622, on page 626 the following language was used: - "The court having therefore properly, although not as required by the statute to cause an issue to be made up, the person charged, the person charged, was the real father of the child or not, and cause such issue to be tried by a jury. How, and in what manner shall the issue be made up?"

It has never been the practice, under the statute, to require formal pleading and no case has been found establishing a different rule. It has been held, however, that where the court had before it the sworn complaint, which shows the complete character of the charge, and the record shows a plea of not guilty, this is sufficient. The People vs. Woodside, 72 Ill. 407."

In so far as we are advised a bastardy proceeding has not only been classed among criminal cases but the procedure has been very much the same as in criminal cases.

In Goff vs The People, 211 Ill. App. 122, the plaintiff in error was indicted for assault with a deadly weapon, with intent to commit bodily injury, and was convicted and sentenced to pay a fine of Fifty Dollars, and costs of prosecution. A writ of error was sued out to reverse the judgment. One of the errors assigned by plaintiff in error, was that the court erred in rendering judgment on the verdict because no plea had been made or entered, and the court, among other things said, "An examination of this record discloses that the plaintiff in error was never arraigned, and never entered any plea in the case and that the court proceeded to trial without any plea having been entered. * * * * * In order to constitute an issue to be tried, it is necessary that a plea be entered, and if no plea is entered and a trial is had without such issue having been made it is, under the several rulings of our court, a nullity."

To the same effect is Persefield vs. The People, 100 Ill. App. 488; Yundt vs. The People, 65 Ill. 372-374.

In the People vs. Ezell, 155 Ill. App. 298 in an action against the defendant for selling liquor in antisaloon territory, the court held that it was essential to a proper trial of a case, to enter a plea before proceeding with the trial, and in that case the court said "There is one error in this case that particularly necessitates a reversal of the judgment and sentence of the lower court, The record does not show that the defendant was arraigned, or that a plea of any kind was made by the defendant or entered of record. In prosecutions for mis-demeanors, the practice is to allow the plea of

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and a trial is had without such issue having been made it is, under
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488; *Yundt vs. The People*, 65 Ill. 272-274.
In the *People vs. McNeil*, 155 Ill. App. 226 in an action
against the defendant for selling liquor in antisaloon territory,
the court held that it was essential to a proper trial of a case, to
enter a plea before proceeding with the trial, and in that case the
court said "There is one error in this case that particularly nec-
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proceedings for mis-same, the practice is to allow the plea of

not guilty to be entered without arraignment. But without this plea being entered, there is nothing to be tried. The plea was not waived by the defendant and it must be held as error. For want of such plea, the judgment should have been arrested. Johnson vs People, 22 Ill. 314; Miller vs People, 47 Ill. App. 472."

In Goff vs The People, supra, it is further said: "In this case, so far as the record discloses, there was no arraignment of the plaintiff in error and no plea entered by her, and under the holdings, of both the Supreme and Appellate courts, the trial was a nullity, and the court erred in entering judgment without such a plea having been entered. It was not the business or duty of the plaintiff in error to see to the entering of the plea, and the going to trial without the plea being entered was not a waiver of such a plea, and the rendering of judgment upon the verdict entered without such a plea, was erroneous."

In the instant case, it was necessary before the trial began that there be an issue of some kind, submitted for trial. While the form may not be of serious importance, it is necessary under the statute, however, that there be a plea entered. It was not incumbent upon the appellant to see to the entering of the plea, and going to trial without the plea being entered, was not a waiver of such a plea.

This error can be corrected, and the accused required to plead before he is again placed on trial. Yundt vs. The People, 65 Ill. 372.

In view of the state of the record the judgment of the County Court of La Salle county is reversed and the cause remanded.

Reversed and Remanded.

to be entered without arraignment. But without this plea entered, it is nothing to be tried. The plea was not waived, the defendant and it must be held as error. For want of such plea, judgment should have been arrested. Johnson vs People, 22 Ill. Miller vs People, 47 Ill. App. 478."

In Goff vs The People, supra, it is further said: "In case, so far as the record discloses, there was no arraignment the plaintiff in error and no plea entered by her, and under the findings, of both the Supreme and Appellate courts, the trial was a nullity, and the court erred in entering judgment without such a plea. It was not the business or duty of the plaintiff in error to see to the entering of the plea, and the going to trial."

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While admitted for trial. While it is necessary under the state, however, that there be a plea entered. It was not incumbent upon the appellant to see to the entering of the plea, and going to trial without the plea being entered, was not a waiver of such a plea. This error can be corrected, and the accused required to be placed on trial. Yundt vs. The People, 111 Ill. 372.

In view of the state of the record the judgment of the court is reversed and remanded.

STATE OF ILLINOIS, ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty- set

Justus L. Johnson
Clerk of the Appellate Court.

OCTOBER TERM A. D. 1925.

507

Agenda 9.

THE PEOPLE OF THE STATE OF :
ILLINOIS EX REL. LORETTA CLARK :
CLARK, :

Appellee, :

vs :

MARCUS KAYS, :

Appellant. :

APPEAL FROM THE COUNTY
COURT OF LA SALLE COUNTY.

ett, J.

This is an appeal from the judgment of the County Court of La Salle county, obtained on the 27th day of December, 1925, in favor of the People Ex Rel Loretta Clark, appellee against Marcus Kays, appellant, in a bastardy proceeding.

A jury trial was had resulting in a finding to the effect that the appellant, Marcus Kays, was the father of the bastard child of Loretta Clark. Motions for a new trial and in arrest of judgment were made and denied. Judgment was rendered on the verdict for \$1100. to be paid in quarterly installments, of which \$425.00 to cover the first three and one fourth years, was past due.

The complaint is in the usual form in such cases. A warrant was issued, appellant arrested and bound over as provided by statute.

The appellant contends that the judgment of the county court should be reversed for the following reasons:

FIRST. It was error for the trial judge to deny the defendant's motion for a continuance of the cause on account of the absence of a material witness.

SECOND. There was no issue presented by way of forming an issue of fact, as provided by the statute, at the next term after which the bond and transcript of the preliminary hearing were filed in the County Court, nor was there any arraignment of the defendant had, or

OCTOBER TERM, D. 1935.

Agenda 3.

OF THE STATE OF

Appellee,

Appellant.

APPEAL FROM THE COUNTY
COURT OF LA SALIE COUNTY.

This is an appeal from the judgment of the County Court
in La Salie County, obtained on the 27th day of December, 1935, in
the case of the People Ex Rel Forester Clark, appellee against Marous

appellant, Marous Kaya, was the father of the bastard child
born to Clark. Motions for a new trial and in arrest of judgment
were made and denied. Judgment was rendered on the verdict for \$100.

The complaint is in the usual form in such cases. A warrant
was issued, appellant arrested and bound over as provided by statute.
The appellant contends that the judgment of the county court
is reversed for the following reasons:

FIRST. It was error for the trial judge to deny the defend-

on for a continuance of the cause on account of the absence
of the witness.

SECOND. There was no issue presented by way of forming an

issue, nor was there any assignment of the defendant had, or

plea entered , and therefore the subsequent proceedings were and are a nullity.

In view of the conclusion we have reached, it is unnecessary for us to review the evidence, or express an opinion concerning it, for the reason that the reversal is based upon matters not pertaining to the evidence heard on the trial of the cause.

The first reason argued for a reversal is that the court erred in refusing to grant appellant's motion for a continuance. From what is disclosed by the affidavit filed in support of the motion the witness Paul Jones was a material one. We have examined the affidavit carefully, and to our minds it is unusually complete and full in all matters of substance, and complies with the requirements as to form. The matters and things that it is claimed could be proven by the absent witness were very material on the part of the appellant, upon the trial of this cause. The testimony which the appellant sought to prove by the absent witness is of such importance to him, that it appears to us he was prejudiced in not being able to obtain a continuance.

It is next insisted that the court erred by proceeding with the trial without an issue being made up, as provided by the statute, and with no plea being entered by or on behalf of the defendant.

A proceeding under Chapter 17 of the Statute has always been classed among criminal cases. *Kelly vs The People*, 29 Ill. 287-290.

Section 4, Chapter 17, Cahill's Statute, among other things provides "The Court at its next term (meaning the next term after the defendant has been bound over to the county court), shall cause an issue to be made up, whether the person charged as aforesaid, is the real father of the child or not, which issue shall be tried by a jury."

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It has never been the practice, under the statute, to require formal pleading, and no case has been found establishing a different rule. It has been held, however, that where the court had before it the sworn complaint, which shows the complete character of the charge, and the record shows a plea of not guilty, this is sufficient. The People -vs- Woodside, 72 Ill. 407."

In so far as we are advised a bastardy proceeding has not only been classed among criminal cases but the procedure has been very much the same as in criminal cases.

In Goff vs The People, 211 Ill. App. 122, the plaintiff in error was indicted for assault with a deadly weapon, with intent to commit bodily injury, and was convicted and sentenced to pay a fine of Fifty Dollars, and costs of prosecution. A writ of error was sued out to reverse the judgment. One of the errors assigned by plaintiff in error, was that the court erred in rendering judgment on the verdict because no plea had been made or entered, and the court, among other things said, "An examination of this record discloses that the plaintiff in error was never arraigned, and never entered any plea in the case and that the court proceeded to trial without any plea having been entered. * * * * * In order to constitute an issue to be tried, it is necessary that a plea be entered, and if no plea is entered and a trial is had without such issue having been made it is, under the several rulings of our court, a nullity."

To the same effect is Persefield -vs- The People, 100 Ill. App. 488; Yundt -vs- The People, 65 Ill. 372-374.

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case is - Woodside, 78 Ill. 407.

In so far as we are advised a pleading proceeding has not

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It was held, and was convicted and sentenced to pay a fine

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In *Goff -vs- The People*, supra, it is further said: "In this case, so far as the record discloses, there was no arraignment of the plaintiff in error and no plea entered by her, and under the holdings, of both the Supreme and Appellate courts, the trial was a nullity, and the court erred in entering judgment without such a plea having been entered. It was not the business or duty of the plaintiff in error to see to the entering of the plea, and the going to trial without the plea being entered was not a waiver of such a plea, and the rendering of judgment upon the verdict entered without such a plea, was erroneous."

In the instant case, it was necessary before the trial began that there be an issue of some kind, submitted for trial. While the form may not be of serious importance, it is necessary under the statute, however, that there be a plea entered. It was not incumbent upon the appellant to see to the entering of the plea, and going to trial without the plea being entered, was not a waiver of such a plea.

In People vs. Eselle, 155 Ill. App. 328, in an action

the defendant for selling liquor in another territory,

it was held that it was essential to a proper trial of a case, to

have a fair and honest proceeding with the trial, and in that case the

court held that it was essential to a proper trial of a case, to

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have a reversal of the judgment and sentence of the lower court.

It is held that the trial of a case is a proceeding, and in that case the

court held that it was essential to a proper trial of a case, to

have a reversal of the judgment and sentence of the lower court.

This error can be corrected, and the accused required to plead before he is again placed on trial. Yundt -vs- The People, 65 Ill. 372.

In view of the state of the record the judgment of the County Court of La Salle county is reversed and the cause remanded.

Reversed and Remanded.

This error can be corrected, and the amount required

is \$100.00. The amount is \$100.00. The amount is \$100.00.

100.00

The amount is \$100.00. The amount is \$100.00. The amount is \$100.00.

The amount is \$100.00. The amount is \$100.00. The amount is \$100.00.

Reversed and Remanded.

100.00

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 630

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

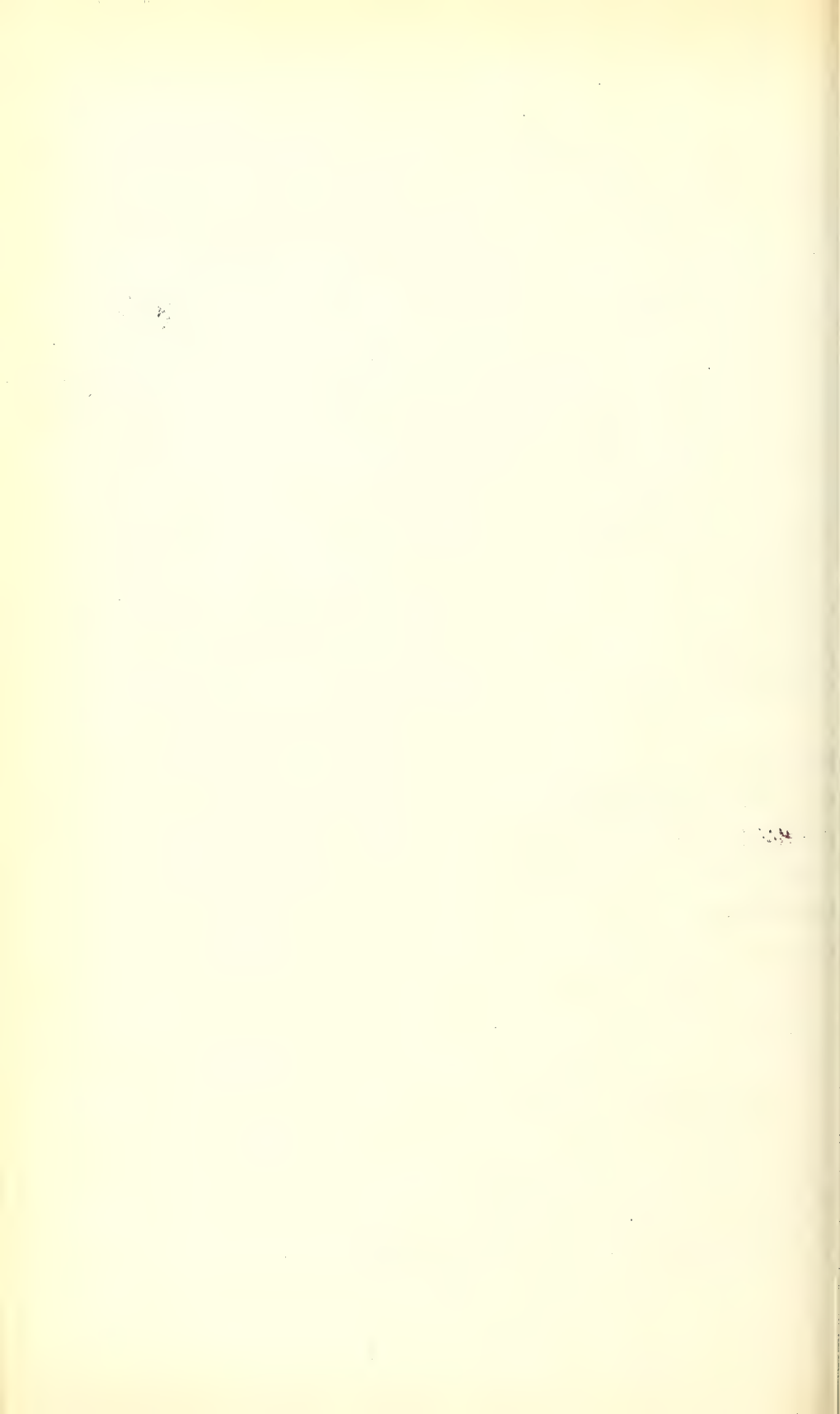
JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

✓ Attorney for appellant - R.W.
Olmstead

✓ for appellee - Chas. Lamb
Michael + Michael



Bert W. Newton, Administrator
of the Estate of George C.
Newton, Deceased,

Appellee,

Appeal from the Circuit
Court of Rock Island
County.

vs.

Illinois Oil Company,

Appellant.

241 I.A. 630

Jett, J.

This cause was before this court at a former term, and an opinion was filed therein on February 16th, 1924, reversing the cause with a finding of fact.

Subsequently, in Mirich vs. T. J. Forchmer Contracting Company, 312 Ill. 343, it was held that in actions at law tried by a jury where the evidence is conflicting and on the part of the plaintiff tends to establish a cause of action, the Appellate Court is not authorized to reverse a judgment for the plaintiff and make a finding of fact without remanding the case.

A petition for a writ of certiorari was filed in the Supreme Court which was granted, and the court reversed and remanded the cause to the Appellate Court of the Second District with directions to pass upon the errors assigned.

The opinion heretofore filed in this cause is adopted as the opinion herein and is refiled, with the following modification: Strike out of the former opinion the following:

"We conclude, therefore, that the judgment of the court below should be reversed, which is accordingly done.

Judgment reversed with finding of fact.

Finding of fact. We find that the father and mother of the deceased were guilty of such contributory negligence that a recovery is barred in this case."

And in lieu of that portion of the former opinion which is stricken substitute the following:

The judgment of the Circuit Court of Rock Island County is reversed and the cause is remanded.

✓ Reversed and Remanded.

October Term A.

W. Newton, Administrator
of the Estate of George C.
Newton, Deceased.

Appeal from the Circuit
Court of Rock Island
County.

Appellee,

241 I.A. 680

Appellant,
Rock Island Oil Company.

This cause was before this court at a former term, and a
motion was filed therein on February 18th, 1924, reversing the
court with a finding of fact.

Subsequently, in *Mitch vs. T. T. Forchner Contracting*
Co., 215 Ill. 342, it was held that in actions at law tried by
jury where the evidence is conflicting and on the part of the
plaintiff tends to establish a cause of action, the Appellate Court
is authorized to reverse a judgment for the plaintiff and make
a finding of fact without remanding the case.

A petition for a writ of certiorari was filed in the
circuit court which was granted, and the court reversed and remanded
the cause to the Appellate Court of the Second District with directions
that it was upon the errors assigned.

The court adopted as

"We conclude, therefore, that the judgment of the court
below should be reversed, which is accordingly done."

Judgment reversed with finding of fact.
Finding of fact. We find that the father and mother of
the deceased were guilty of such contributory negligence
as to constitute a bar to the case."

The judgment of the Circuit Court of Rock Island County
is reversed and the cause is remanded.

STATE OF ILLINOIS, ss. J. JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract

1935.

7523

Agenda 12.

EMOT . NEWTON, Administrator
of the Estate of George C.
Newton, Deceased,

Appellee,

-vs-

ILLINOIS OIL COMPANY,

Appellant.

APPEAL FROM THE CIRCUIT
COURT OF ROCK ISLAND
COUNTY.

241 I.A. 630

Jett, J.

This cause was before this court at a former term, and an opinion was filed therein on February 13th, 1924, reversing the cause with a finding of fact.

Subsequently, in *Virich -vs- T. J. Virich Contracting Company*, 312 Ill. 342, it was held that in actions at law tried by a jury where the evidence is conflicting and on the part of the plaintiff tends to establish a cause of action, the Appellate Court is not authorized to reverse a judgment for the plaintiff and make a finding of fact without remanding the case.

A petition for a writ of certiorari was filed in the Supreme Court which was granted, and the court reversed and remanded the cause to the Appellate Court of the Second District with directions to pass upon the errors assigned.

The opinion heretofore filed in this cause is adopted as the opinion herein and is refiled, with the following modification: Strike out of the former opinion the following:

"We conclude, therefore, that the judgment of the court below should be reversed, which is accordingly done.

Judgment reversed with finding of fact.

Finding of fact. We find that the father and mother of the deceased were guilty of such contributory negligence that a recovery is barred in this case."

And in lieu of that portion of the former opinion which is stricken substitute the following:

The judgment of the Circuit Court of Rock Island County is reversed and the cause is remanded.

Reversed and Remanded.

760 1
AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term A. D. 1925.

Otto J. Guelde,

Plaintiff in error,

vs.

Charles Rockabrand,

Defendant in error.

Error to the

Circuit Court of

La Salle, County.

241 I.A. 630

Jett, J.

This is an action of trespass begun in the Circuit Court of La Salle County by Otto J. Guelde, plaintiff in error, hereinafter termed "plaintiff" against Charles Rockabrand, defendant in error, hereinafter called "defendant" to recover damages for personal injuries which the plaintiff alleges he sustained by being wilfully and maliciously assaulted and kicked in the ribs by the defendant, on the 14th day of April, 1921, in Earlville, in the county of La Salle. A jury trial was had with a finding in favor of the defendant. Judgment was entered on the verdict, to reverse which, this writ of error is prosecuted.

The declaration consists of two counts in trespass vi et armis. The pleas of the defendant were the general issue and son assault demesne. The plaintiff filed a general replication de injuria.

The parties to this proceeding are farmers living near Earlville in La Salle County. There was some difference between them growing out of the trespassing of stock and for the hauling of certain grain which it was claimed had not been paid for, and the plaintiff brought suit before a justice of the peace in Earlville who had his office on the second floor of the City Hall in said town. The matter was brought to an issue on April 14th, 1921.

The plaintiff went to the city hall and had a talk with the justice of the peace relative to the getting of additional witnesses. He left the hall and went down the stairway and as he passed to the walk leading to the street the defendant was on or near the platform

October Term A. D. 1925.

to J. Guelde,
Plaintiff in error,
Circuit Court of
La Salle County,
241 I.A. 680
Defendant in error.

This is an action of trespass begun in the Circuit Court of
La Salle County by Otto J. Guelde, plaintiff in error, hereinafter
called "plaintiff" against Charles Roekbrandt, defendant in error,
hereafter called "defendant" to recover damages for personal injuries
which the plaintiff alleges he sustained by being willfully and
deliberately assaulted and kicked in the ribs by the defendant, on the
day of April, 1921, in Earlville, in the county of La Salle. A
trial was had with a finding in favor of the defendant. Judgment
was entered on the verdict, to reverse which, this writ of error is

The declaration consists of two counts in trespass vi et
contra. The plea of the defendant were the general issue and non
assumpsit. The plaintiff filed a general replication de injuria.
The parties to this proceeding are farmers living near
Earlville in La Salle County. There was some difference between them
concerning out of the trespassing of stock and for the hauling of certain
material which it was claimed had not been paid for, and the plaintiff
sued before a Justice of the Peace in Earlville who had his
office on the second floor of the City Hall in said town. The matter
was brought to an issue on April 14th, 1921.

The plaintiff went to the city hall and had a talk with the
Justice of the Peace relative to the getting of additional witnesses.
He left the hall and went down the stairway and as he passed to the

in front of the hall. The plaintiff after reaching the sidewalk concluded to return and ask the justice of the peace something further about the witnesses and turned to go back to the office of the justice, and as he did so the defendant gave him a kick with his foot striking him in the breast at about the short ribs, tearing the ribs loose and causing him injury from which it is claimed he still suffers.

It is the contention of the defendant that at the time the difficulty took place the plaintiff called him a vile name and attacked him in a threatening mood.

The evidence is conflicting as to just what occurred at the precise moment and immediately before the alleged assault was made.

There were a number of reasons assigned for a reversal of the judgment. Owing to the conclusion we have reached we do not deem it necessary to enter into any extended discussion of what the testimony discloses other than as above stated. The defendant pleaded son assault demesne, thereby admitting the alleged assault. The plaintiff replied de injuria. The burden then rested upon the defendant to show, that he struck in his necessary self-defense, and that he used no more force than was necessary, and these elements should not have been ignored or eliminated by the modification of plaintiff's tendered instructions or by those given at the instance of the defendant.

In a civil suit for assault and battery, in which the defendant pleads son assault demesne, the burden is upon him to show that he acted in his necessary self-defense, and that he used no more force than was necessary, and the instructions should not ignore this element. The instructions in this case violated this rule. *Abt vs. Burgheim*, 80 Ill. 22; *Gizler vs Witzel*, 82 Ill. 522. *Wells vs Englehart* 118 Ill. App. 217.

Instruction No. 12 given on the part of the defendant is as follows: "The court further instructs the jury that if you believe that a witness has knowingly and wilfully testified falsely as to any one material fact in the case, then and in that instance you may disregard the whole testimony of such witness excepting as to

front of the hall. The plaintiff after reaching the sidewalk

included to return and ask the justice of the peace something further

the witnesses and turned to go back to the office of the justice

as he did so the defendant gave him a kick with his foot striking

in the breast at about the short ribs, tearing the ribs loose

causing him injury from which it is claimed he still suffers.

It is the contention of the defendant that at the time

the difficulty took place the plaintiff called him a vile name and

The evidence is conflicting as to just what occurred

the precise moment and immediately before the alleged assault was

There were a number of reasons assigned for a reversal of the

going to the conclusion we have reached we do not deem it

to enter into any extended discussion of what the testimony

other than as above stated. The defendant pleaded non assult

thereby admitting the alleged assault. The plaintiff replied

The burden then rested upon the defendant to show that he

in his necessary self-defense, and that he used no force

was necessary, and these elements should not have been ignored or

by the modification of plaintiff's tendered instructions or

those given at the instance of the defendant.

In a civil suit for assault and battery, in which the

plaintiff pleads non assult defense, the burden is upon him to show

that he acted in his necessary self-defense, and that he used no more

than was necessary, and the instructions should not ignore this

The instructions in this case violated this rule. App.

80 Ill. 2d; Giesler vs Witzel, 32 Ill. 2d. Wells vs Engelhardt,

Ill. App. 217.

Instruction No. 12 given on the part of the defendant is as

The court further instructs the jury that if you believe

that a witness has knowingly and willfully testified falsely as to any

material fact in the case, then and in that instance you may

any fact or circumstances which said witness relates and which is corroborated by other testimony or facts or circumstances proven on the trial which you do believe."

Instruction No. 15 is subject to the same criticism as instruction No. 12 above quoted.

Substantially the same instruction was given in Chicago & Alton Railroad Co. vs Kelly, Admr. 210 Ill. 449, and the court in that case at page 452 said: "We are of the opinion the instruction is in conflict with the long established rule of evidence in force in this State and that the giving thereof constituted reversible error."

Furthermore the record is replete with improper remarks and evidence of improper conduct on the part of the attorney for the defendant in error, which conduct was in our judgment very prejudicial to the interests of the plaintiff and should not have been tolerated.

For the reasons indicated the judgment of the Circuit Court of La Salle County is reversed and the cause is remanded.

Reversed and Remanded.

... of circumstances which said witness relates and which is
... by other testimony or facts or circumstances proven or
... which you do believe."

Instruction No. 11 is subject to the same criticism as

Instruction No. 12 above quoted.

Substantially the same instruction was given in Chicago

Illinois Railroad Co. vs Kelly, 210 Ill. App. 449, and the court

in that case at page 452 said: "We are of the opinion the instruc-

tion is in conflict with the long established rule of evidence

Furthermore the record is replete with improper remarks

and evidence of improper conduct on the part of the attorney for

defendant in error, which conduct was in our judgment very

For the reasons indicated the judgment of the Circuit

of La Salle County is reversed and the cause is remanded.

Reversed and Remanded.

STATE OF ILLINOIS,) ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.)
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
March in the year of our Lord one thousand
nine hundred and twenty-nix

Justus L. Johnson
Clerk of the Appellate Court.

OCTOBER TERM A. D. 1925.

OTTO J. GUELDA,

Plaintiff-in-error,

vs

CHARLES ROCKABRAND,

Defendant-in-error.

241 I.A. 630

Error to the

Circuit Court of

LaSalle County.

Jett, J.

This is an action of trespass begun in the Circuit Court of LaSalle county by Otto J. Guelda, plaintiff-in-error, herein-after termed "plaintiff" against Charles Rockabrand, defendant-in-error, hereinafter called "defendant" to recover damages for personal injuries which the plaintiff alleges he sustained by being wilfully and maliciously assaulted and kicked in the ribs by the defendant, on the 14th day of April, 1921, in Earlville, in the county of LaSalle. A jury trial was had with a finding in favor of the defendant. Judgment was entered on the verdict, to reverse which, this writ of error is prosecuted.

The declaration consists of two counts in trespass vi et armis. The pleas of the defendant were the general issue and son assault demesne. The plaintiff filed a general replication de injuria.

The parties to this proceeding are farmers living near Earlville in LaSalle county. There was some difference between them growing out of the trespassing of stock and for the hauling of certain grain which it was claimed had not been paid for, and the plaintiff brought suit before a justice of the peace in Earlville who had his office on the second floor of the City Hall in said town. The matter was brought to an issue on April 14th, 1921.

The plaintiff went to the city hall and had a talk with the justice of the peace relative to the getting of additional witnesses. He left the hall and went down the stairway and as he passed to the walk leading to the street the defendant was on or near the platform in front of the hall. The plaintiff after reaching the sidewalk

concluded to return and ask the justice of the peace something further about the witnesses and turned to go back to the office of the justice, and as he did so the defendant gave him a kick with his foot striking him in the breast at about the short ribs, tearing the ribs loose and causing him injury from which it is claimed he still suffers.

It is the contention of the defendant that at the time the difficulty took place the plaintiff called him a vile name and attacked him in a threatening mood.

The evidence is conflicting as to just what occurred at the precise moment and immediately before the alleged assault was made.

There are a number of reasons assigned for a reversal of the judgment. Owing to the conclusion we have reached we do not deem it necessary to enter into any extended discussion of what the testimony discloses other than as above stated. The defendant pleaded non assult deemesne, thereby admitting the alleged assault. The plaintiff replied de injuria. The burden then rested upon the defendant to show, that he struck in his necessary self-defense, and that he used no more force than was necessary, and these elements should not have been ignored or eliminated by the modification of plaintiff's tendered instructions or by those given at the instance of the defendant.

In a civil suit for assault and battery, in which the defendant pleads non assult deemesne, the burden is upon him to show that he acted in his necessary self-defense, and that he used no more force than was necessary, and the instructions should not ignore this element. The instructions in this case violated this rule. *Abt vs Burghelm*, 80 Ill. 32; *Gizler vs Witzel*, 32 Ill. 322. *Wells vs Englehart*, 118 Ill. App. 217.

Instruction No. 12 given on the part of the defendant is as follows: "The court further instructs the jury that if you believe that a witness has knowingly and wilfully testified falsely

as to any one material fact in the case, then and in that instance you may disregard the whole testimony of such witness excepting as to any fact or circumstances which said witness relates and which is corroborated by other testimony or facts or circumstances proven on the trial which you do believe."

Instruction No. 15 is subject to the same criticism as instruction No. 12 above quoted.

Substantially the same instruction was given in Chicago & Alton Railroad Co. vs Kelly, Admr., 210 Ill. 448, and the court in that case at page 452 said: "We are of the opinion the instruction is in conflict with the long established rule of evidence in force in this State and that the giving thereof constituted reversible error".

Furthermore the record is replete with improper remarks and evidence of improper conduct on the part of the attorney for the defendant in error, which conduct was in our judgment very prejudicial to the interests of the plaintiff and should not have been tolerated.

For the reasons indicated the judgment of the Circuit Court of LaSalle county is reversed and the cause is remanded.

Reversed and Remanded.



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 630

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term, A. D. 1925

The People of the State
of Illinois,

Defendant in Error,

vs.

Abe Berman,

Plaintiff in Error.

Writ of error to
the County Court of
Boone County.

Jett, J.

On May 14th, 1923 an information consisting of eight counts was filed in the County Court of Boone County against Abe Berman. The first count, stripped of all formalities, charges that "Abe Berman on to-wit: the first day of September, 1922, at and within the town of Belvidere, in the County of Boone, and State of Illinois, did then and there unlawfully sell intoxicating liquor while the said town of Belvidere was then and there in prohibition territory contrary to the form of the statute in such cases made and provided and against the peace and dignity of the same people of the State of Illinois."

It will not be necessary to set out the language contained in the other counts of the information because they are not involved in this proceeding.

It appears that the plaintiff in error entered a plea of guilty to the first count of the information and was fined \$200.00 and was adjudged to pay said fine and the ~~costs~~ costs accrued in said cause.

It is the contention of plaintiff in error that the information to which he entered a plea of guilty does not state an offense against him and that the court erred in accepting a plea of guilty to the said first count.

It will be observed that the count charges that the plaintiff in error "did then and there unlawfully sell intoxicating

October Term, A. D. 1928

People of the State
of Illinois,

Writ of error to

Defendant in Error,

the County Court of

vs.

Boone County.

Abner

Plaintiff in Error.

On May 14th, 1928 an information consisting of eight counts

was filed in the County Court of Boone County against Abner.

The first count, stripped of all formalities, charges that "Abner

on-wit: the first day of September, 1928, at and within the town of

Boone, in the County of Boone, and State of Illinois, did then and

there unlawfully sell intoxicating liquor while the said town of

Boone was then and there in prohibition territory contrary to the

provisions of the statute in such cases made and provided and against the

peace and dignity of the State of Illinois."

It will not be necessary to set out the language contained

in the other counts of the information because they are not involved

in this proceeding.

It appears that the plaintiff in error entered a plea

of not guilty to the first count and the other counts.

He was adjudged to pay said fine and the ~~expenses~~ costs incurred

in said cause.

It is the contention of plaintiff in error that the in-

formation to which he entered a plea of guilty does not state an offense

against him and that the court erred in accepting a plea of guilty to

the said first count.

It will be observed that the count charges that the

plaintiff in error "did then and there unlawfully sell intoxicating

liquor while the said town of Belvidere was then and there in prohibition territory." A count in these words does not state facts sufficient to charge an offense under the Prohibition Act. People vs. Peisoz, 226 Ill. App. 362; People vs. Wallace, 216 Ill. 120.

To the same effect is People vs Martin, 214 Ill. 110; People vs. Barnes id 140; People vs. Minto, 318 Ill. 292.

It has also been held that since no waiver or consent of a defendant to a criminal prosecution or estoppel against him can confer jurisdiction or authorize his conviction in the absence of an accusation charging him with a violation of the criminal law, and that the court will not affirm a judgment where the defendant was charged with no offense against the law, when the fact is brought to its attention, though the defendant should not, either in the trial court or the court of review, object on that ground. People vs. Wallace, supra; People vs. Minto, supra.

For the reasons above indicated the judgment of the County Court of Boone County is reversed,

Reversed.

ignorance while the said town of Belvidere was then and there in prohibition

territory. A count in these words does not state facts sufficient

to charge an offense under the Prohibition Act. People vs. Belas,

36 Ill. App. 383; People vs. Wallace, 318 Ill. 120.

To the same effect is People vs. Martin, 314 Ill. 110; People

vs. Barnes 14 140; People vs. Minto, 318 Ill. 233.

It has also been held that since no waiver or consent of

the State is necessary to authorize his conviction in the absence of an

accusation charging him with a violation of the criminal law, and

the defendant was

charged with no offense against the law, when the fact is brought

to its attention, though the defendant should not, either in the trial

or of the court of review, object on that ground. People vs.

Belas, supra; People vs. Minto, supra.

For the reasons above indicated the judgment of the County

of Boone County is reversed.

Reversed.

STATE OF ILLINOIS,) ss. J. JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.)
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty- six.

Justus L. Johnson
Clerk of the Appellate Court.

OCTOBER TERM, A. D. 1935.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs

ABE BERMAN,

Plaintiff in Error.

Jett, J.

241 I.A. 630

Writ of error to
the County Court of
Boone County.

On May 14th, 1923 an information consisting of eight counts was filed in the County Court of Boone County against Abe Berman. The first count, stripped of all formalities, charges that "Abe Berman on to-wit: the first day of September, 1922, at and within the town of Belvidere, in the County of Boone, and State of Illinois, did then and there unlawfully sell intoxicating liquor while the said town of Belvidere was then and there in prohibition territory contrary to the form of the statute in such cases made and provided and against the peace and dignity of the same people of the State of Illinois."

It will not be necessary to set out the language contained in the other counts of the information because they are not involved in this proceeding.

It appears that the plaintiff in error entered a plea of guilty to the first count of the information and was fined \$200.00 and was adjudged to pay said fine and the costs accrued in said cause.

It is the contention of plaintiff in error that the information to which he entered a plea of guilty does not state an offense against him and that the court erred in accepting a plea of guilty to the said first count.

It will be observed that the count charges that the plaintiff in error "did then and there unlawfully sell intoxicating liquor while the said town of Belvidere was then and there in prohibition territory". A count in these words does not state facts sufficient to charge an offense under the Prohibition Act. People vs Peisch, 223 Ill. App. 363; People vs Wallace, 313 Ill. 120.

To the same effect is People vs Martin, 314 Ill. 110; People vs Barnes id 140; People vs Minto, 318 Ill. 293.

It has also been held that since no waiver or consent of a defendant to a criminal prosecution or estoppel against him can confer jurisdiction or authorize his conviction in the absence of an accusation charging him with a violation of the criminal law, and that the court will not affirm a judgment where the defendant was charged with no offense against the law, when the fact is brought to its attention, though the defendant should not, either in the trial court or the court of review, object on that ground. People vs Wallace, supra; People vs Minto, supra.

For the reasons above indicated the judgment of the County Court of Boone County is reversed.

Reversed.

abstract

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 630

present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

Partlow
Angelo
24

✓ BE IT REMEMBERED, that afterwards, to-wit: On

MAR 29 1926

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

Carl Blomgren and Elmer
Reiling, Partners doing
business under the firm
name of Moline Oakland
Company,

Appellants,

vs.

Andrew Stotmeister,

Appellee

Jett, J.

241 I.A. 630

Appeal from the Circuit
Court of Rock Island
County.

This is an action of replevin instituted by Carl Blomgren and Elmer J. Reiling, partners doing business under the firm name of Moline Oakland Company, appellants for the recovery of an Oakland automobile from Andrew Stotmeister, appellee.

A jury trial was had and a finding for appellee. Judgment having been rendered upon the verdict of the jury, appellants prosecute this appeal.

Appellants are automobile dealers and had a sales agent by the name of Dan Morris. They negotiated a sale of an Oakland automobile to appellee. A contract was entered into and an agreement signed at the farm of appellee. Elmer Reiling, one of the appellants, was at the farm at the time of the execution of the agreement but did not see the contract signed because the transaction appears to have taken place between appellee and Morris. Reiling had been to see appellee a number of times before the contract was finally entered into. It provided for a cash payment of \$800.00 and an old car which appellee was to turn in as part payment for the new car. The car Reiling and Morris were in on the day they went to the farm, at which time the contract was entered into, was a new car but had been used as a demonstrator.

A few days after the contract had been entered into Morris

October Term A. D. 1925

241 T. A. 230

Appeal from the Circuit
Court of Rock Island
County.

Appellants,

vs.

Andrew Stotmeister,

Appellee

This is an action of replevin instituted by Carl Blomgren and Elmer J. Reiling, partners doing business under the firm name of Moline Oakland Company, appellants for the recovery of an Oakland automobile from Andrew Stotmeister, appellee. A jury trial was had and a finding for appellee. Judgment with a lien rendered upon the verdict of the jury, appellee's property. This appeal.

Appellants are automobile dealers and had a sales agent by the name of Dan Morris. They negotiated a sale of an Oakland automobile to appellee. A contract was entered into and an agreement was made at the time of the sale of the automobile, one of the appellants, at the time of the execution of the agreement but did not see the contract signed because the transaction appears to have taken place between appellee and Morris. Reiling had been to see appellee a number of times before the contract was finally entered into. It provided for a cash payment of \$800.00 and an old car which was to turn in as part payment for the new car. The car and Morris were in on the day they went to the farm, at which time the contract was entered into, was a new car but had been used by the defendant.

met appellee in Moline, and proposed that he pay for the car and take the demonstrator to use until the new car should be delivered to him. To this suggestion of Morris' appellee replied that he would have to see his banker. Appellee and Morris went to the bank, where appellee procured a cashier's check payable to Morris and after receiving the check Morris left the bank with appellee and shortly thereafter he suggested to appellee that he needed \$20.00. After some conversation they stepped into another bank and Morris was introduced by appellee. Morris indorsed the check and the banker cashed it. Morris received the money and absconded and appellee took the demonstrator and this replevin suit followed.

It is earnestly insisted by appellants that Morris was not their sales agent. The record discloses that appellants were desirous of selling appellee an Oakland automobile. Appellant Reiling made a number of trips alone to the farm to see appellee relative to the sale. Later on he appeared at the farm accompanied by Morris. On the trip Morris made with appellant Reiling, he immediately became very active in the matter of selling appellee the car. It was Morris who finally obtained the contract from appellee.

The record discloses that Reiling had informed appellee that he had a partner in his business but did not mention his name. Appellee knew Reiling but not Blomgren. There are many other facts and circumstances disclosed by the record and from all of which we are convinced that Morris was the sales agent of appellants.

It is next insisted by appellants that an agent has no authority to sell property and receive payment therefor. The general rule, as we understand it, is that an agent who has been held out as clothed with apparent authority to sell property may receive payment for the same. *Simmons Motor Co. vs Dudley*, 196 Ill. App. 329.

The sale in this instance as disclosed by the evidence was completed when the money was paid by appellee to Morris who had been held out to be the agent of appellants.

It is also urged by appellants that even though the authority

Appellee in Molina, and proposed that he pay for the car and
the demonstrator to use until the new car should be delivered
him. To this suggestion of Morris, appellee replied that he would
go to see his banker. Appellee and Morris went to the bank, where
appellee procured a cashier's check payable to Morris and after
receiving the check Morris left the bank with appellee and shortly
after he suggested to appellee that he needed \$20.00. After
conversation they stopped into another bank and Morris was intro-
duced by appellee. Morris indorsed the check and the banker cashed
it. Morris received the money and absconded and appellee took the
demonstrator and this replevin suit followed.
It is earnestly insisted by appellants that Morris was not
a sales agent. The record discloses that appellants were desirous
of selling appellee an Oakland automobile. Appellant Reiling made a
trip alone to the farm to see appellee relative to the
purchase. Later on he appeared at the farm accompanied by Morris. On
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very active in the matter of selling appellee the car. It was
Morris who finally obtained the contract from appellee.
The record discloses that Reiling had informed appellee that
Morris was a partner in his business but did not mention his name.
There are many other facts known to Reiling but not disclosed. There are many other facts
disclosed by the record and from all of which we
are convinced that Morris was the sales agent of appellants.
It is next insisted by appellants that an agent has no
authority to sell property and receive payment therefor. The general
rule is that an agent who has been held out as
having authority to sell property may receive payment
therefor. Simmons Motor Co. vs. Dudley, 198 Ill. App. 323.
The sale in this instance as disclosed by the evidence was
made when the money was paid by appellee to Morris who had been
held out to be the agent of appellants.
It is so ordered by the court.

of the agent to sell carried with it the authority to receive payment, appellee did not buy the demonstrator but bought a new car to be delivered to him at a later date and therefore he has no right to retain possession of the demonstrator. We can not agree with this contention. Morris was in possession of the demonstrator at the time he received the cash payment of \$800.00. He had been acting as sales agent and the transaction was within the scope of his apparent authority. If appellants themselves had made the same contract as was made by Morris with appellee, there can be no doubt that appellee would have the right to retain possession of the demonstrator until a new car was delivered to him.

It is insisted that the verdict is not sufficient to support the judgment because it fails to find the issues for the defendant and that the right of property is in him. There is no merit in this contention.

The record discloses that the court instructed the jury as to the form of the verdict as follows:

"If you find the issues in this cause in favor of the plaintiff, the form of your verdict will be as follows: 'We, the jury, find that the property of the Oakland Automobile was in the plaintiffs and not in the defendant'".

"If you find the issues in this case in favor of the defendant, the form of your verdict will be as follows: 'We the jury, find that the property of the Oakland automobile was in the defendant, and not in the plaintiffs'".

The jury returned the following verdict:

"We, the jury, find that the property of the Oakland automobile was in the defendant and not in the plaintiffs."

The only issue in the case was as to the right of property and we are of the opinion that the instruction as to the form of the verdict and the verdict itself are substantially correct.

It is also argued that the judgment fails to adjudge that the defendant have and recover the property. It is true the judgment is informal. The judgment is supported, however, in *Bledsoe vs. Zeigenhein Bros. Furniture Co.*, 161 Ill. App. 146-148. We are of the opinion that the objection to the judgment is not well taken.

the agent to sell carried with it the authority to receive payment.
Morris did not buy the demonstrator but bought a new car to be
delivered to him at a later date and therefore he has no right to
retain possession of the demonstrator. We can not agree with this
contention. Morris was in possession of the demonstrator at the time
he received the cash payment of \$800.00. He had been acting as sales
agent and the transaction was within the scope of his apparent
authority. If appellants themselves had made the same contract as was
made by Morris with appellee, there can be no doubt that appellee
would have the right to retain possession of the demonstrator until
a new car was delivered to him.

It is insisted that the verdict is not sufficient to support
the contention that the right of property is in him. There is no merit in this
contention. The record discloses that the court instructed the jury as
follows:

"If you find the issues in this case in favor of the
plaintiff, the form of your verdict will be as follows:
We, the jury, find that the property of the Oakland
Automobile was in the plaintiff and not in the defendant."

"If you find the issues in this case in favor of the
defendant, the form of your verdict will be as follows:
We, the jury, find that the property of the Oakland
Automobile was in the defendant, and not in the plaintiff."

The jury returned the following verdict:

"We, the jury, find that the property of the Oakland
Automobile was in the defendant and not in the plaintiff."

The only issue in the case was as to the right of property

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verdict and the verdict itself are substantially correct.

It is also argued that the judgment fails to adjudge

that the defendant have and recover the property. It is true that

the judgment is informal. The judgment is supported, however, in

the opinion of the court by the fact that the objection to the judgment is not well

Some discussion is had relative to the rulings of the court upon the trial of the cause as to the admissibility of certain evidence. While there may be some slight error in such rulings yet, after an examination of the record we are not prepared to say that they are sufficient to warrant a reversal of the case.

We conclude, therefore, that the judgment of the Circuit Court of Rock Island County should be affirmed, which is accordingly done.

Judgment Affirmed.

Some discussion is had relative to the rulings of the
upon the trial of the cause as to the admissibility of certain
evidence. While there may be some slight error in such rulings
after an examination of the record we are not prepared to say
that they are sufficient to warrant a reversal of the case.
We conclude, therefore, the judgment of the Circuit
Court of Rock Island County should be affirmed, which is accordingly

Judgment Affirmed.

STATE OF ILLINOIS,) ss. J. JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
— *Mar.* — in the year of our Lord one thousand
nine hundred and twenty-*six*.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract only

OCTOBER TERM A. D. 1935.

7562

Agenda 39.

CARL BLONGREN and ELMER
REILING, Partners doing
business under the firm
name of Moline Oakland
Company,

Appellants,

APPEAL FROM THE CIRCUIT
COURT OF ROCK ISLAND
COUNTY.

-VS-

ANDREW STOTWEISTER,

Appellee.

Jett, J.

This is an action of replevin instituted by Carl Blongren and Elmer J. Reiling, partners doing business under the firm name of Moline Oakland Company, appellants for the recovery of an Oakland automobile from Andrew Stotmeister, appellee.

A jury trial was had and a finding for appellee. Judgment having been rendered upon the verdict of the jury, appellants prosecute this appeal.

Appellants are automobile dealers and had a salesagent by the name of Dan Morris. They negotiated a sale of an Oakland automobile to appellee. A contract was entered into and an agreement signed at the farm of appellee. Elmer Reiling, one of the appellants, was at the farm at the time of the execution of the agreement but did not see the contract signed because the transaction appears to have taken place between appellee and Morris. Reiling had been to see appellee a number of times before the contract was finally entered into. It provided for a cash payment of \$800.00 and an old car which appellee was to turn in as part payment for the new car. The car Reiling and Morris were in on the day they went to the farm, at which time the contract was entered into, was a new car but had been used as a demonstrator.

A few days after the contract had been entered into Morris met appellee in Moline, and proposed that he pay for the car and take the demonstrator to use until the new car should be delivered to him. To this suggestion of Morris' appellee replied that he would have to see his banker. Appellee and Morris went to the bank, where appellee procured a cashier's check payable to Morris and after receiving the check Morris left the bank with appellee and shortly thereafter he suggested to appellee that he needed \$20.00. After some conversation they stepped into another bank and Morris was introduced by appellee. Morris indorsed the check and the banker cashed it. Morris received the money and absconded and appellee took the demonstrator and this replevin suit followed.

It is earnestly insisted by appellants that Morris was not their salesagent. The record discloses that appellants were desirous of selling appellee an Oakland automobile. Appellant Reiling made a number of trips alone to the farm to see appellee relative to the sale. Later on he appeared at the farm accompanied by Morris. On the trip Morris made with appellant Reiling, he immediately became very active in the matter of selling appellee the car. It was Morris who finally obtained the contract from appellee.

The record discloses that Reiling had informed appellee that he had a partner in his business but did not mention his name. Appellee knew Reiling but not Blomgren. There are many other facts and circumstances disclosed by the record and from all of which we are convinced that Morris was the sales agent of appellants.

It is next insisted by appellants that an agent has no authority to sell property and receive payment therefor. The general rule, as we understand it, is that an agent who has been held out as clothed with apparent authority to sell property may receive payment for the same. *Simmons Motor Co. vs Dudley*, 136 Ill. App. 329.

The sale in this instance as disclosed by the evidence was

...for days after the contract had been entered into
...and proposed that he pay for the car
...the demonstrator to use until the new car should be delivered
...To this suggestion of Morris, appellee replied that he would
...see his banker. Appellee and Morris went to the bank, where
...procured a cashier's check payable to Morris and after
...giving the check Morris left the bank with appellee and shortly
...he suggested to appellee that he needed \$20.00. After
...consultation they stepped into another bank and Morris was
...by appellee. Morris informed the check and the banker
...Morris received the money and absconded and appellee took
...thereafter and this reply was followed.
...It is earnestly insisted by appellants that Morris was not
...The record discloses that appellee was cautious
...in appellee an Oakland automobile. Appellant Relling made a
...trip alone to the farm to see appellee relative to the sale.
...on he appeared at the farm accompanied by Morris. On the trip
...with - appellant Relling, he immediately became very
...in the matter of selling appellee the car. It was Morris who
...of the contract from appellee.
...The record discloses that Relling had informed appellee so
...had a car in his business but did not mention his name,
...as he Relling but not Bloomer. There are many other facts
...disclosed by the record and from all of which it
...It is next insisted by appellants that an agent had
...to sell property and receive payment therefor. The general
...we understand it, is that an agent who has been held out as
...with apparent authority to sell property may receive payment.
...James Motor Co. vs. Dugan, 196 Ill. App. 329.
...The sale in this instance as disclosed by the evidence was

completed when the money was paid by appellee to Morris who had been held out to be the agent of appellants.

It is also urged by appellants that even though the authority of the agent to sell carried with it the authority to receive payment, appellee did not buy the demonstrator but bought a new car to be delivered to him at a later date and therefore he has no right to retain possession of the demonstrator. We can not agree with this contention. Morris was in possession of the demonstrator at the time he received the cash payment of \$800.00. He had been acting as sales agent and the transaction was within the scope of his apparent authority. If appellants themselves had made the same contract as was made by Morris with appellee, there can be no doubt that appellee would have the right to retain possession of the demonstrator until a new car was delivered to him.

It is insisted that the verdict is not sufficient to support the judgment because it fails to find the issues for the defendant and that the right of property is in him. There is no merit in this contention.

The record discloses that the court instructed the jury as to the form of the verdict as follows:

"If you find the issues in this case in favor of the plaintiff, the form of your verdict will be as follows:
'We, the jury, find that the property of the Oakland Automobile was in the plaintiffs and not in the defendant'".

"If you find the issues in this case in favor of the defendant, the form of your verdict will be as follows:
'We, the jury, find that the property of the Oakland automobile was in the defendant, and not in the plaintiffs'".

The jury returned the following verdict:

"We, the jury, find that the property of the Oakland automobile was in the defendant and not in the plaintiffs."

The only issue in the case was as to the right of property and we are of the opinion that the instruction as to the form of the verdict and the verdict itself are substantially correct.

...ated when the money was paid by appellee to Morris who had

...held out to be the agent of appellant.

It is also urged by appellants that even though the author-

...the money was paid by appellee to Morris who had

...the money was paid by appellee to Morris who had

...delivered to him at a later date and therefore he has no right to

...consession of the demonstrator. We can not agree with this

...on. Morris was in possession of the demonstrator at the time

...received the cash payment of \$800.00. He had been acting as sales

...and the transaction was within the scope of his apparent author-

...It appears themselves had made the same contract as was made

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...because it fails to find the issues for the defendant and

...the right of property is in him. There is no merit in this con-

...The record discloses that the court instructed the jury as

...the form of the verdict as follows:

"If you find the issues in this case in favor of the

plaintiff, the form of your verdict will be as follows:

"We, the jury, find that the property of the Oakland

Automobile was in the plaintiff's and not in the defendant's."

"If you find the issues in this case in favor of the

defendant, the form of your verdict will be as follows:

"We, the jury, find that the property of the Oakland

Automobile was in the defendant's and not in the plaintiff's."

The jury returned the following verdict:

"We, the jury, find that the property of the Oakland

Automobile was in the defendant and not in the plaintiff's."

The only issue in the case was as to the right of property

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...and the verdict itself are substantially correct.

It is also argued that the judgment fails to adjudge that the defendant have and recover the property. It is true the judgment is informal. The judgment is supported, however, in *Bledsoe -vs- Seigenheim Bros. Furniture Co.*, 161 Ill. App. 146-148. We are of the opinion that the objection to the judgment is not well taken.

Some discussion is had relative to the rulings of the court upon the trial of the cause as to the admissibility of certain evidence. While there may be some slight error in such rulings yet, after an examination of the record we are not prepared to say that they are sufficient to warrant a reversal of the case.

We conclude, therefore, that the judgment of the Circuit Court of Rock Island County should be affirmed, which is accordingly done.

Judgment Affirmed.

It is also argued that the judgment fails to adjudge

that the defendant have and recover the property. It is true the

judgment is informal. The judgment is supported, however, in

the case of *Seigenschein Bros. Lumber Co., 181 Ill. App. 145-148.*

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While there may be some slight error in such rulings

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they are sufficient to warrant a reversal of the cause.

We conclude, therefore, that the judgment of the Circuit

in the cause should be affirmed, which is accordingly

Judgment Affirmed.

Abstract

AT A TERM OF THE APPELLATE COURT,

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begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 631

Present--The Hon. NORMAN L. JONES, Presiding Justice.

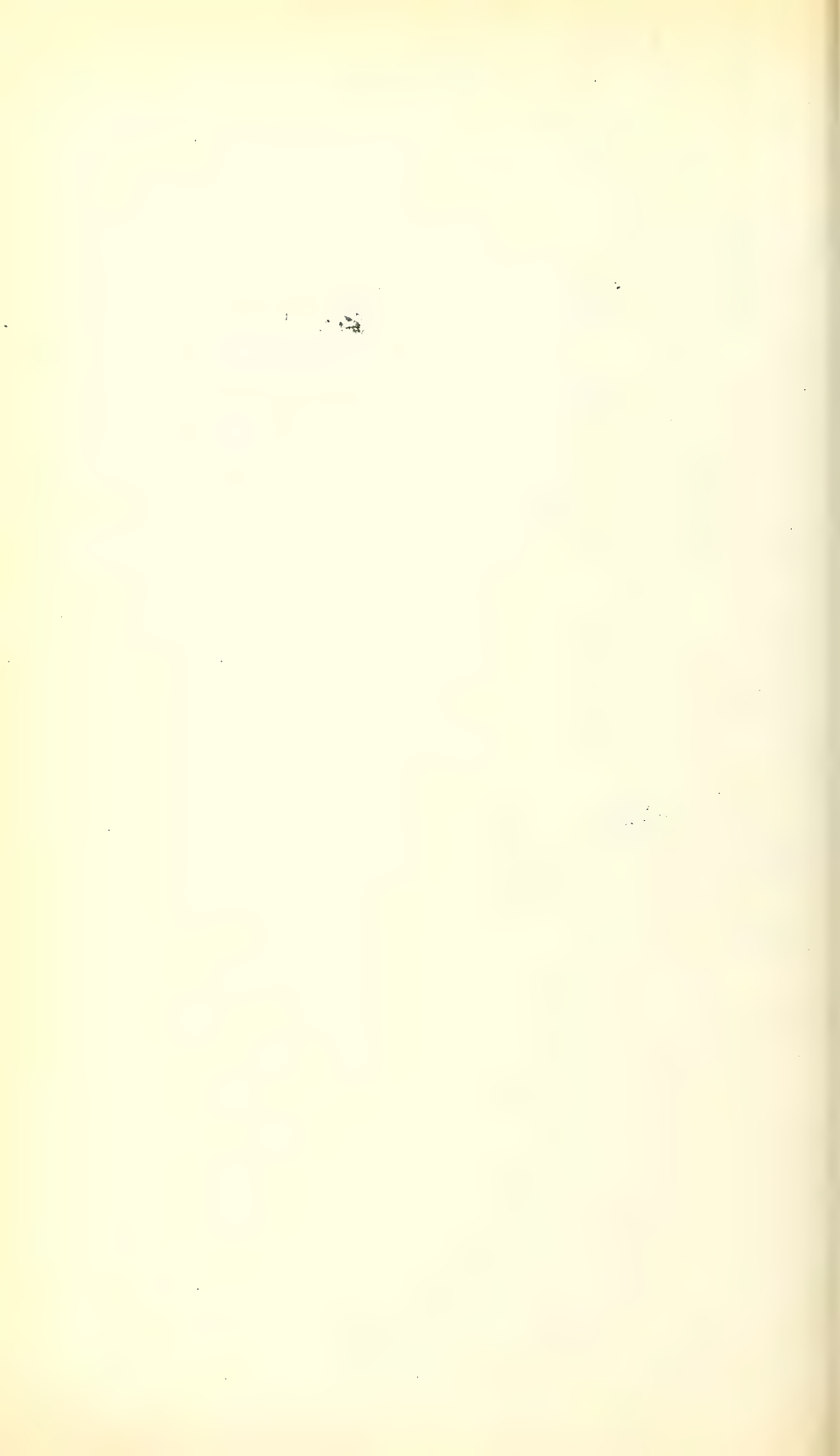
Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



John W. Glasgow,

appellee,

vs.

Appeal from the County Court

of Peoria County.

Family Wet Wash Laundry
of Peoria, a corporation,

appellant,

241 I.A. 631

Jett, J.

John W. Glasgow, appellee, brought suit in the county court of Peoria county, against the Family Wet Wash Laundry of Peoria, a corporation, appellant, to recover for services as a book-keeper. A jury trial was had and appellee obtained a judgment for \$385.50 from which appellant prosecutes this appeal.

The declaration consists of the common counts in assumpsit for work and labor to the amount of \$500.00, and for interest in a like amount, and a special count stating that the defendant had requested the plaintiff to perform certain work and services for it, for which it promised to pay the plaintiff on request, as much as the said services were reasonably worth. The plea of the general issue was filed by the defendant.

It is the contention of appellant that the verdict of the jury is against the manifest weight of the evidence; that evidence of the reasonable value of plaintiff's services was not admissible, and that certain instructions given on the part of appellee, should not have been given.

The evidence shows that in October, 1920, appellant employed appellee as book-keeper at a salary of fifty dollars per month, and he was so paid until January first, 1921. After that date it is the contention of appellee that he requested appellant to increase his salary to One Hundred Dollars per month. Appellee insists appellant agreed to the increase and agreed to pay him at the rate of One Hundred Dollars per month; that he was paid at the rate of One Hundred Dollars per month for January, February and March, but was not paid for April, May, June and a part of July.

John W. Glasgow,

appellee,

Appeal from the County Court

of Peoria County.

vs.

Family Wet Wash Laundry
of Peoria, a corporation,

appellant,

241 I.A. 631

John W. Glasgow, appellee, brought suit in the county court of

Peoria county, against the Family Wet Wash Laundry, a

corporation, appellant, to recover for services as a book-keeper,

A jury trial was had and appellee obtained a judgment for \$385.50

from which appellant prosecuted this appeal.

The declaration consists of the common counts in assumpsit for

work and labor to the amount of \$500.00, and for interest in a like

amount, and a special count stating that the defendant had requested

the plaintiff to perform certain work and services for it, for which

it promised to pay the plaintiff on request, as much as the said

services were reasonably worth. The plea of the general issue was

tried by the defendant.

It is the contention of appellant that the verdict of the jury

is against the manifest weight of the evidence; that evidence of the

reasonable value of plaintiff's services was not admissible, and that

certain instructions given on the part of appellee, should not have

been given.

The evidence shows that in October, 1920, appellant employed

appellee as book-keeper at a salary of fifty dollars per month, and

he was so paid until January first, 1921. After that date it is the

contention of appellee that he requested appellant to increase his

salary to one hundred dollars per month. Appellee insists appellant

refused to the increase and agreed to pay him at the rate of one

hundred dollars per month; that he was paid at the rate of one hundred

dollars per month for January, February and March, but was not paid

for April, May, June and a part of July.

Appellee had done some work for appellant in the filing of a claim for the refunds of taxes for the year 1919, which, however, is not involved in this proceeding. In discussing the work for the year 1921, appellee and the manager of appellant discussed the fact that in order to make up the tax returns for the year 1920, it would be necessary for appellee to go back over the books, not only for the year of 1920, but also for the year 1919. Also, that the corporation reports were to be made out and that all of this work was in addition to the regular book work which appellee was engaged to do when he began his employment in October, 1920.

Appellant insists the contract was for but \$50.00 per month and that it was never changed, and appellee has been paid in full. In support of the position of appellant certain checks were introduced in evidence showing payment during the latter part of 1920, at \$50.00 per month, also evidence that certain sums had been paid the first part of 1921, which payments appellant claims were at the rate of \$50.00 per month. The evidence is conflicting. It was a question of fact for the jury to say whether the salary was \$50.00 or \$100.00 per month after January 1st, and we do not feel justified in reversing the judgment on the ground that it is contrary to the weight of the evidence.

On the trial appellee introduced evidence as to the reasonable value of the services performed by him and appellant insists that this was an error for the reason that there was an express contract for a specified amount. It is quite apparent from the evidence that there was some talk and negotiations with reference to an increase to \$100.00 per month. It is insisted by appellant that unless appellee proved that there was an increase it would necessarily remain \$50.00 per month.

The rule is that where the declaration contains the common counts with a special count on a contract for services, and there is a dispute between parties as to the compensation plaintiff was to receive

Appellee had done some work for appellant in the fall of

a claim for the refunds of taxes for the year 1919, which, however,

is not involved in this proceeding. In discussing the work for the

year 1921, appellee and the manager of appellant discussed the fact

that in order to make up the tax returns for the year 1920, it would

be necessary for appellee to go back over the books, not only for

the year of 1920, but also for the year 1919. Also, that the com-

position reports were to be made out and that all of this work was

in addition to the regular book work which appellee was engaged to

do when he began his employment in October, 1920.

Appellant insists the contract was for but \$50.00 per month and

that it was never changed, and appellee has been paid in full. In

support of the position of appellant certain checks were introduced

in evidence showing payment during the latter part of 1920, at \$50.00

per month, also evidence that certain sums had been paid the first

part of 1921, which payments appellant claims were at the rate of

\$75.00 per month. The evidence is conflicting. It was a question of

fact for the jury to say whether the salary was \$50.00 or \$100.00

per month after January 1st, and we do not feel justified in reversing

the finding of the jury that it was \$75.00 per month.

Reversed.

On appeal appellee introduced evidence as to the reasonable

value of the services performed by him and appellant insists that this

was an error for the reason that there was an express contract for a

specified amount. It is quite apparent from the evidence that there

was some talk and negotiations with reference to an increase to

\$75.00 per month. It is insisted by appellant that unless appellee

showed that there was an increase it would necessarily remain \$50.00

per month.

The rule is that where the declaration contains the common count

and a special count on a contract for services, and there is a dis-

crepancy between the two, the common count will be sustained.

under the contract, plaintiff is not limited to the special count on the contract, but may offer evidence of the reasonable value of the services performed, and may recover on quantum meruit, if the jury believe there was no meeting of minds of the parties as to the terms of the contract. People's Claim Adjust. Co. v. Darrow, 172 Ill. 62-64.

However, it appears that the appellant was not injured by the court allowing appellee to offer evidence of the reasonable value of the services for the reason that the jury's verdict must have been based upon the fact that there was a specific contract for \$100.00 per month. This conclusion is reached by reason of the amount found by the jury in favor of appellee.

It is also insisted by appellant that the instructions given on behalf of the appellee are erroneous because they repeated the law bearing upon the preponderance of evidence and the burden of proof. We have examined the instructions complained of, and are of the opinion that the court could have properly refused some of them, not upon the ground that they did not contain a fair statement of the law, but because they were a repetition of other instructions which were given. While the instructions may be subject to criticism, we do not think it was reversible error to give them.

The judgment of the County court of Peoria county, will therefore be affirmed.

Judgment affirmed.

under the contract, plaintiff is not limited to the special count on the contract, but may offer evidence of the reasonable value of the services performed, and may recover on quantum meruit, if the jury believe there was no meeting of minds of the parties as to the terms of the contract. People's Claim Against Co. v. Darrow, 111 Ill. 62-64.

However, it appears that the appellant was not injured by the court allowing appellee to offer evidence of the reasonable value of the services for the reason that the jury's verdict must have been based upon the fact that there was a specific contract for \$100.00 per month. This conclusion is reached by reason of the amount found by the jury in favor of appellee.

It is also insisted by appellant that the instructions given on behalf of the appellee are erroneous because they repeated the law bearing upon the preponderance of evidence and the burden of proof. We have examined the instructions complained of, and are of the opinion that the court could have properly refused some of them, and upon the ground that they did not contain a fair statement of the law, but because they were a repetition of other instructions which were given. While the instructions may be subject to criticism, we do not think it was reversible error to give them.

The judgment of the County court of Peoria county, will therefore be affirmed.

STATE OF ILLINOIS,) ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.)
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty- six

Justus L. Johnson
Clerk of the Appellate Court.

OCTOBER TERM, A. D. 1925.

JOHN W. GLASCOW,	:	
	:	
Appellee,	:	
	:	APPEAL FROM THE COUNTY
vs	:	COURT OF PEORIA COUNTY.
	:	
FAMILY WET WASH LAUNDRY	:	
OF PEORIA, a corporation,	:	
	:	
Appellant.	:	

Jett, J.

John W. Glasgow, appellee, brought suit in the County court of Peoria county, against the Family Wet Wash Laundry of Peoria, a corporation, appellant, to recover for services as a book-keeper. A jury trial was had and appellee obtained a judgment for \$385.50 from which appellant prosecutes this appeal.

The declaration consists of the common counts in assumption of work and labor to the amount of \$500.00, and for interest in a like amount, and a special count stating that the defendant had requested the plaintiff to perform certain work and services for it, for which it promised to pay the plaintiff on request, as much as the said services were reasonably worth. The plea of the general issue was filed by the defendant.

It is the contention of appellant that the verdict of the jury is against the manifest weight of the evidence; that evidence of the reasonable value of plaintiff's services was not admissible, and that certain instructions given on the part of appellee, should not have been given.

The evidence shows that in October, 1920, appellant employed appellee as book-keeper at a salary of fifty dollars per month, and he was so paid until January First, 1921. After that date it is the contention of appellee that he requested appellant to increase his salary to One Hundred Dollars per month. Appellee insists appellant agreed to the increase and agreed to pay him at the rate of One

OCTOBER TERM, A. D. 1925.

APPEAL FROM THE COUNTY
COURT OF PEORIA COUNTY.

Appellee,

WET WASH LAUNDRY

PEORIA, a corporation,

Appellant.

John W. Glasgow, appellee, brought suit in the County Court of Peoria County, against the Family Wet Wash Laundry of Peoria, a corporation, appellant, to recover for services as a book-keeper. A jury trial was had and appellee obtained a judgment for \$5.50 from which appellant prosecutes this appeal.

The declaration consists of the common counts in assumpsit for work and labor to the amount of \$800.00, and for interest at like amount, and a special count stating that the defendant requested the plaintiff to perform certain work and services for which it promised to pay the plaintiff on request, as the said services were reasonably worth. The plea of the defendant was filed by the defendant.

It is the contention of appellant that the verdict of the jury is against the manifest weight of the evidence; that evidence of the reasonable value of plaintiff's services was not admissible, and that certain instructions given on the part of appellee, should have been given.

The evidence shows that in October, 1920, appellant employed appellee as book-keeper at a salary of fifty dollars per month, and so paid until January first, 1921. After that date it is the contention of appellee that he requested appellant to increase his salary to One Hundred Dollars per month. Appellee insists appellant the increase and agreed to pay him at the rate of One

Hundred Dollars per month; that he was paid at the rate of One Hundred Dollars per month for January, February and March, but was not paid for April, May, June and a part of July.

Appellee had done some work for appellant in the filing of a claim for the refunds of taxes for the year 1919, which, however, is not involved in this proceeding. In discussing the work for the year 1921, appellee and the manager of appellant discussed the fact that in order to make up the tax returns for the year 1920, it would be necessary for appellee to go back over the books, not only for the year of 1920, but also for the year 1919. Also, that the corporation reports were to be made out and that all of this work was in addition to the regular book work which appellee was engaged to do when he began his employment in October, 1920.

Appellant insists the contract was for but \$50.00 per month and that it was never changed, and appellee has been paid in full. In support of the position of appellant certain checks were introduced in evidence showing ¹¹⁸⁷payment during the latter part of 1920, at \$50.00 per month, also evidence that certain sums had been paid the first part of 1921, which payments appellant claims were at the rate of \$50.00 per month. The evidence is conflicting. It was a question of fact for the jury to say whether the salary was \$50.00 or \$100.00 per month after January 1st, and we do not feel justified in reversing the judgment on the ground that it is contrary to the weight of the evidence.

On the trial appellee introduced evidence as to the reasonable value of the services performed by him and appellant insists that this was an error for the reason that there was an express contract for a specified amount. It is quite apparent from the evidence that there was some talk and negotiations with reference to an increase to \$100.00 per month. It is insisted by appellant that unless appellee proved that there was an increase it would necessarily remain \$50.00 per month.

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The trial appellee introduced evidence as to the respon-

...collected amount. It is quite apparent from the evidence

\$50.00 per month.

The rule is that where the declaration contains the common counts with a special count on a contract for services, and there is a dispute between parties as to the compensation plaintiff was to receive under the contract, plaintiff is not limited to the special count on the contract, but may offer evidence of the reasonable value of the services performed, and may recover on quantum meruit, if the jury believe there was no meeting of minds of the parties as to the terms of the contract. People's Claim Adjust. Co. vs Darrow, 172 Ill. 62-64.

However, it appears that the appellant was not injured by the court allowing appellee to offer evidence of the reasonable value of the services for the reason that the jury's verdict must have been based upon the fact that there was a specific contract for \$100.00 per month. This conclusion is reached by reason of the amount found by the jury in favor of appellee.

It is also insisted by appellant that the instructions given on behalf of the appellee are erroneous because they repeated the law bearing upon the preponderance of evidence and the burden of proof. We have examined the instructions complained of, and are of the opinion that the court could have properly refused some of them, not upon the ground that they did not contain a fair statement of the law, but because they were a repetition of other instructions which were given. While the instructions may be subject to criticism, we do not think it was reversible error to give them.

The judgment of the County court of Peoria county, will therefore be affirmed.

Judgment affirmed.

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with a special count on a contract for services, and there is
between parties as to the compensation plaintiff was to re-
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on the contract, but may offer evidence of the reasonable value
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This conclusion is reached by reason of the amount found by
in favor of appellee.
It is further stated that the court in its instructions
the court in its instructions. The court in its instructions
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because they were a repetition of other instructions which
While the instructions may be subject to criticism, we do
it was reversible error to give them.
The judgment of the County Court of Foris county, will
be affirmed.
Judgment affirmed.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 631

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Thomas F. Mack, Receiver in
the Matter of Elizabeth Mack
vs James Nolan, et al,

Appellee,

vs

The Liverpool and London and
Globe Insurance Company, Ltd.,
a Corporation,

Appellant.

241 I.A. 631

Appeal from the
Circuit Court of
Mercer County Illinois.

Jett, J.

Thomas F. Mack, receiver in the matter of Elizabeth Mack against James Nolan, et al, appellee, instituted this suit against The Liverpool and London and Globe Insurance Company, Ltd., a corporation, appellant, in the circuit court of Mercer county, on a policy of fire insurance. Appellant filed a demurrer to the declaration which was, by the court, overruled and it elected to stand by its demurrer. Evidence was heard and judgment rendered in favor of appellee for \$1,000, the amount of the loss. Appellant prosecutes this appeal.

The only question involved in the case is, did the court err in sustaining the demurrer to the declaration?

For the purpose of this opinion appellee will be called plaintiff and appellant the defendant.

The plaintiff in his declaration charges that the defendant, on, to-wit: the 27th day of February, 1920, in, to-wit: the Village of Viola, Mercer County, Illinois, made its policy of insurance and delivered the same to James Nolan, assured mentioned therein, and for the consideration therein expressed promised the said James Nolan, in the terms of the said policy and the conditions thereto annexed, which said policy and conditions are fully set out in the declaration.

The declaration further charges that on the 19th day of February, 1919, Gustaf Tollenaar was the owner of the real estate on which was located the buildings and property insured, covered by

241 I.A. 631

Appeal from the
Circuit Court of
Mercer County, Illinois.

Thomas W. Mack, Receiver in
Matter of Elizabeth Mack
James Nolan, et al,

Appellee,

vs

Liverpool and London and
Globe Insurance Company, Ltd.,
Appellant.

Appellant.

Thomas W. Mack, receiver in the matter of Elizabeth Mack
James Nolan, et al, appellee, instituted this suit against
Liverpool and London and Globe Insurance Company, Ltd., a cor-
poration, appellant, in the circuit court of Mercer county, on a
policy of fire insurance. Appellant filed a demurrer to the declaration
which was, by the court, overruled and it elected to stand by its
plea. Evidence was heard and judgment rendered in favor of
appellee for \$1,000, the amount of the loss. Appellant prosecutes
this appeal.

The only question involved in the case is, did the court er-
ring in sustaining the demurrer to the declaration?
For the purpose of this opinion appellee will be called
plaintiff and appellant the defendant.

The plaintiff in his declaration charges that the defendant,
to-wit: the 27th day of February, 1920, in, to-wit: the village
of Chicago, Mercer County, Illinois, made its policy of insurance and
delivered the same to James Nolan, assured mentioned therein, and for
consideration therein expressed promised the said James Nolan,
on the terms of the said policy and the conditions thereto annexed,
said policy and conditions are fully set out in the declaration.
The declaration further charges that on the 12th day of
August, 1920, Gustaf Tollenaar was the owner of the real estate on
which the buildings and property

the policy of insurance, and on the said day the said Gustaf Tollenaer and Pauline Tollenaer, his wife, executed a certain trust deed to R. P. Wait, as trustee, to secure the payment of an indebtedness of \$18,000 which said trust deed conveyed to R. P. Wait, trustee, the premises last above mentioned subject to reconveyance upon the payment of said indebtedness of \$18,000, and thereafter the said Gustaf Tollenaer and Pauline Tollenaer his wife, conveyed to James Nolan all their interest in said premises by a deed dated February 26th, 1920.

The plaintiff also sets out in the declaration that on or about the date of the execution of said trust deed to R. P. Wait, Elizabeth Mack for a good and valuable consideration purchased of R. P. Wait the notes secured by the said trust deed together with all the interest of said trustee in said deed and that she then became the owner of the encumbrance on said lands, executed by Gustaf Tollenaer and Pauline Tollenaer his wife, and that thereafter, as hereinbefore mentioned, the said James Nolan became the owner of the fee simple title to said lands.

It is further averred by the plaintiff that at the time of the execution and delivery of the policy of insurance on the 27th day of February, 1920, James Nolan was the owner of the fee simple title to said premises and Elizabeth Mack was the owner of the encumbrance against the same and secured by the trust deed.

It is also averred by the plaintiff that it was provided in said trust deed that the maker of the same would keep all the buildings at any time on said premises insured against loss by fire, or tornado in companies to be approved by the holder of said trust deed, in an amount equal to the indebtedness described in said trust deed and would deliver to the holder of said indebtedness the insurance policies so written as to require all loss to be applied in the reduction of said indebtedness and the insurance policy hereinabove described as executed on the 27th day of February, 1920, bore on its face the following endorsement, "Notice accepted of an encumbrance of \$18,000., on premises herein described," and the said

... policy of insurance, and on the said day the said Gustaf Tollenius
and Pauline Tollenius, his wife, executed a certain trust deed to
Wait, as trustee, to secure the payment of an indebtedness of \$18,000
said trust deed conveyed to R. A. Wait, trustee, the promisee
last above mentioned subject to reconveyance upon the payment of said
indebtedness of \$18,000, and thereafter the said Gustaf Tollenius and
Pauline Tollenius his wife, conveyed to James Nolan all their interest
in said premises by a deed dated February 28th, 1920.
The plaintiff also sets out in the declaration that on or
at the date of the execution of said trust deed to R. A. Wait,
Elizabeth Mack for a good and valuable consideration purchased of
R. A. Wait the notes secured by the said trust deed together with
the interest of said trustee in said deed and that she then became
the owner of the premises on said land, executed by Gustaf Tollenius
and Pauline Tollenius his wife, and that thereafter, as hereinafter
mentioned, the said James Nolan became the owner of the fee simple title
in said land.
It is further averred by the plaintiff that at the time of
the execution and delivery of the policy of insurance on the 27th
of February, 1920, Nolan was the owner of the fee simple
title to said premises and Elizabeth Mack was the owner of the
insurance against the same and secured by the trust deed.
It is also averred by the plaintiff that it was provided
in the trust deed that the maker of the same would keep all the
books at any time on said premises insured against loss by fire,
and also in companies to be approved by the holder of said trust
deed, in an amount equal to the indebtedness described in said trust
deed and would deliver to the holder of said indebtedness the
insurance policies so written as to require all loss to be applied
in the reduction of said indebtedness and the insurance policy
above described as executed on the 27th day of February, 1920,
and in the first following endorsement, "Notice accepted of an
insurance of \$18,000, on premises herein described," and the said

policy of insurance was procured by the said James Nolan to comply with the provisions of said trust deed.

The plaintiff further charges that on the 9th day of June, 1924 the said Elizabeth Mack was then the owner of the note secured by the trust deed above mentioned, and filed in the circuit court of Mercer County, Illinois, her certain bill of complaint of foreclosure of said trust deed on the premises mentioned in the trust deed and in the said policy of insurance, and in and by said bill of complaint Elizabeth Mack represented to the court that the defendant James Nolan had defaulted in the payment of interest on said indebtedness due her, as well as in the payment of taxes, and that the said James Nolan had left the real estate in question and left Mercer County, and that his place of residence could not be ascertained and at that time she, the said Elizabeth Mack could not ascertain whether the property described in the said trust deed had been insured and prayed the court to appoint a receiver to take charge of said property and to collect the rents from the same.

It is further set forth in the declaration that on the same day, to-wit: the 9th day of June, 1924, the plaintiff, Thomas E. Mack, was appointed receiver in the matter of Elizabeth Mack against James Nolan and the said receiver was ordered and directed by the court to take possession and charge of the real estate, hereinbefore mentioned, to collect the income from the same, to pay for such repairs as might be absolutely necessary, to keep the property insured, to pay the taxes and to bring the balance of the money into court to await the order of the court.

And it is further charged by the plaintiff in the declaration that said order appointing the receiver was made on the 9th day of June, 1924, during the hours the court was in session and before five o'clock in the afternoon; that thereafter on or about ten o'clock in the evening of the same day the barn on the premises described in the said policy and in the trust deed hereinabove mentioned was consumed and destroyed by fire whereby the plaintiff then and there sustained

policy of insurance was procured by the said James Nolan to comply with the provisions of said trust deed.

The plaintiff further charges that on the 29th day of June, 1934, the said Elizabeth Mack was then the owner of the note secured by the trust deed above mentioned, and filed in the circuit court of Essex County, Illinois, her certain bill of complaint of foreclosure of said trust deed on the premises mentioned in the trust deed, and in the said policy of insurance, and in and by said bill of complaint Elizabeth Mack represented to the court that the

defendant James Nolan had defaulted in the payment of interest on indebtedness due her, as well as in the payment of taxes, and the said James Nolan had left the real estate in question and Mercer County, and that his place of residence could not be ascertained and at that time she, the said Elizabeth Mack could not ascertain whether the property described in the said trust deed had been insured and prayed the court to appoint a receiver to take possession of said property and to collect the rents from the same. It is further set forth in the declaration that on the

29th day of June, 1934, the plaintiff, Thomas J. Mack, was appointed receiver in the matter of Elizabeth Mack against James Nolan and the said receiver was ordered and directed by the court to take possession and charge of the real estate, hereinbefore mentioned, to collect the income from the same, to pay for repairs as might be absolutely necessary, to keep the property insured, to pay the taxes and to bring the balance of the money into the court.

And it is further charged by the plaintiff in the declaration that said order appointing the receiver was made on the 29th day of

June, 1934, at about ten o'clock in the afternoon; that thereafter on or about ten o'clock in the morning of the same day the barn on the premises described in the trust deed and in the first deed heretofore mentioned was consumed by fire whereby the plaintiff then and there sustained a

loss and damages to the amount of \$1,000, which said loss and damage did not happen by means of any invasion, insurrection, riot, mob, military or usurped power and the plaintiff says that from the time of the making of said policy and from thence until the happening of the loss and damage hereinabove mentioned, the said Elizabeth Mack had an interest in the said property to the amount of the said sum so insured by the defendant thereon and that at the time of his appointment the plaintiff, as receiver under the order of this Court, had an interest in the said insurance on said property for the use of Elizabeth Mack, and that at the time of said loss he, the plaintiff, for the use of Elizabeth Mack was the insured person and that upon said loss the insurance, in the amount of \$1,000 was payable to him and the defendant became then and there indebted to him, the plaintiff, in the said amount of \$1,000. And the plaintiff avers that forth-with after the happening of said loss and damage on, to-wit; the 9th day of June, 1924, he gave notice thereof to the defendant and on the 7th day of August, 1924, delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit accompanied by the oath of the assured, James Nolan, and accompanied by his, plaintiff's, oath that the same was in all respects just and true and showed the value of the said property and in what manner the said building was occupied at the time of the happening of the said loss and damages and did render to the defendant a particular account of loss, stating the date and circumstances of the same, the exact nature of the title of the assured and all others in the property, and by whom and for what purpose said building was occupied at the time of the loss, all encumbrances on the property and otherwise complied with the provisions of the policy.

It is further ^Navered that by an order of Court entered on the 26th day of September, 1924, the plaintiff was ordered and directed by the court to commence an action for the recovery of the loss under the said policy of insurance. Then follows the allegation relative to the addamnum.

It is insisted by the defendant that the court was in error in sustaining the demurrer to the declaration, and it is urged that

the policy of insurance did not cover the interest of the holder of the trust deed and for that reason plaintiff is a stranger to the contract and cannot maintain the suit; that the policy provided that if suit was filed to foreclose a mortgage the policy should become null and void and that a suit was filed and for that reason the insurance ceased; that the court was in error in refusing to require the plaintiff to file a bill of particulars.

It is insisted that the court erred in denying the defendant's motion for a bill of particulars. The only purpose of a bill of particulars is to advise the defendant of the claim relied upon by the plaintiff for a recovery. In this proceeding there is but one claim relied upon and that is for the loss of the barn in the sum of \$1,000. If a bill of particulars had been filed the only thing which could have been set out would have been a mere repetition of the declaration that the claim was for a loss in the sum of \$1,000 occasioned by the burning of the barn in controversy. No other loss was sued for as is shown by the declaration. We are of the opinion that the court committed no error in his ruling in refusing to require the plaintiff to file a bill of particulars.

The declaration alleges that the suit was filed on the 9th day of June, 1924, by Elizabeth Meek to foreclose the trust deed in question and this was on the same day on which the receiver was appointed and was during the hours the court was in session and before five o'clock in the afternoon; that thereafter on or about ten o'clock in the evening of the same day the barn on the premises described in the policy and in the trust deed was consumed and destroyed by fire. It is urged that since the declaration alleges that a bill was filed to foreclose the trust deed before the time of the alleged loss that such commencement of foreclosure suit makes the policy null and void; the policy containing a provision that it shall be void upon the commencement of foreclosure proceedings.

This raises the question, when is a suit in chancery commenced? The purpose of the provision to be construed is to be regarded in determining what shall be considered the commencement of a suit. For some purposes the Statute makes the beginning of a

the policy of insurance did not cover the interest of the holder of the trust deed and for that reason plaintiff is a stranger to the contract cannot maintain the suit; that the policy provided that it was void if a suit was filed and for that reason the insurance ceased; that a suit was filed and for that reason the insurance ceased; the court was in error in refusing to require the plaintiff to file a bill of particulars.

It is insisted that the court erred in denying the defendant's motion for a bill of particulars. The only purpose of a bill of particulars is to advise the defendant of the claim relied upon by the plaintiff for a recovery. In this proceeding there is but one claim relied upon and that is for the loss of the barn in the sum of \$1,000. It is of particulars had been filed the only thing which could have been

was for a loss in the sum of \$1,000 occasioned by the burning of the barn in controversy. No other loss was sued for as is shown by the declaration. We are of the opinion that the court committed no error in his ruling in refusing to require the plaintiff to file a bill of particulars.

The declaration alleges that the suit was filed on the 9th of June, 1924, by Elizabeth Mack to foreclose the trust deed in session and this was on the same day on which the receiver was appointed and was during the hours the court was in session and before five o'clock in the afternoon; that thereafter on about ten o'clock in the evening of the same day the barn on the premises described in the declaration and in the trust deed was consumed and destroyed by fire. It is urged that since the declaration alleges that a bill was filed to foreclose the trust deed before the time of the alleged loss that the commencement of foreclosure suit makes the policy null and void.

This raises the question, when is a suit in chancery commenced? The purpose of the provision to be considered is to be determined what shall be considered the commencement of the suit. No case is cited in the Statute.

chancery suit the time of the filing of the bill, and many decisions hold that the commencement of a suit in law or chancery is either upon the filing of the bill or on delivery of process to the sheriff, but in every case which we have examined including those cited by appellant wherein the courts have so held the question involved was one of limitations. The only reason for permitting an insurance company to place such a provision in its policy or to cancel its policy when an action to foreclose a mortgage on the property is commenced is because of the extra hazard when the mortgagor knows of an action having been instituted to foreclose the mortgage, and the temptation arises to make an effort to raise money to stop such proceedings.

The authorities relied upon by appellant apply to a situation where the policy of insurance provided that it should be void if foreclosure proceedings were commenced with the knowledge of the insured and in those cases it was held that such provision must be held valid if insurer had such knowledge before loss occurred, on the theory that an extra hazard was created, not contemplated by the contract of insurance. If insured, the mortgagor, did not know proceedings were commenced the policy would not be voided even though it contained such a clause.

This question arose in *Findley vs Union Mutual Fire Insurance Company*, 74 Vermont 211, 52 Atl. 429 and in this case the court said: "The plaintiff also claims that foreclosure proceedings are not commenced, within the meaning of this provision, until the suit is entered in court. The purpose of the provision to be construed is always regarded in determining what shall be considered the commencement of a suit. We think the service of a petition upon the insured must be regarded as the commencement under this provision. It is then that the insured has the knowledge that produces the increase of risk. From that time on he understands that he can avoid the consequences of his default only by making some payment or arrangement, and the moment when he will become convinced of his inability to do this is entirely uncertain. The protection which the provision is designed to secure

every case which we have examined including those cited by appellant in the courts have so held the question involved was one of fact. The only reason for permitting an insurance company to make such a provision in its policy or to cancel its policy when an action to foreclose a mortgage on the property is commenced is because the extra hazard when the mortgagee knows of an action having been instituted to foreclose the mortgage, and the temptation arises to make effort to raise money to stop such proceedings.

foreclosure proceedings were commenced with the knowledge of the insured and in those cases it was held that such provision must be void. If it insurer had such knowledge before loss occurred, on the theory that an extra hazard was created, not contemplated by the contract of insurance. If insurer, mortgagee, did not know proceedings were commenced the policy would not be voided even though it contained such a clause.

This question arose in *Findlay vs Union Mutual Fire Insurance Co.*, 74 Vermont 211, 52 Atl. 429 and in this case the court said: "The plaintiff also claims that foreclosure proceedings are not voided, within the meaning of this provision, until the suit is filed in court. The purpose of the provision to be construed in light of the determination what shall be considered the commencement of the suit. We think the service of a petition upon the insured must be regarded as the commencement under this provision. It is then that the insured has the knowledge that produces the increase of risk. From that time on he understands that he can avoid the consequences of his default only by making some payment or arrangement, and the moment he becomes convinced of his inability to do this is entirely void."

would not be obtained if the entry of the case was to be treated as the beginning of the suit."

From the above it will be seen that the commencement of the suit, in view of the facts in this case, is not the filing of the bill but is at the time of the service of process upon the insured. We have not been able to find any case except the above one that passes directly upon this question. The declaration charges that Nolan, the defendant, in the foreclosure proceedings, was absent from home at the time the bill was filed and that his whereabouts was not known; the record discloses that he was not served with summons until eleven days after the filing of the bill. The rule announced in Findlay vs Union Mutual Fire Insurance Company, supra, finds support in 26 C. J. 238, sec. 299.

The pendency of a suit begins with the service of process or appearance, at which time the court acquires jurisdiction, power or control of the subject matter and parties until final judgment. Gage vs Chicago Title & Tr. Co., 303 Ill. 569.

Furthermore the provision with relation to the policy becoming void in the event foreclosure proceedings are commenced, without the consent of the insurance company, is inoperative where the insurance company knows of the encumbrance. The declaration averred that the trust deed provided that the maker thereof would keep all the buildings on said premises insured against loss by fire or tornado in companies to be approved by the holder of said trust deed, in an amount equal to the indebtedness described in said trust deed and would deliver to the holder of said indebtedness the insurance policies so written as to require all loss to be applied in the reduction of said indebtedness and the insurance policy issued on the 27th day of February, 1920 bore on its face the following endorsement, "notice accepted of an encumbrance of \$18,000, on premises herein described", and that the said policy of insurance was procured by the said James Nolan to comply with the provisions of said trust deed.

The defendant must have known when attaching the mortgage clause to the policy in question that it might become necessary for

It is not to be obtained if the entry of the case was to be treated as the timing of the suit."

From the above it will be seen that the commencement of the suit, in view of the facts in this case, is not the filing of the bill but is at the time of the service of process upon the insured. It has not been able to find any case except the above one that comes directly upon this question. The declaration charges that the defendant, in the foreclosure proceedings, was absent from the time the bill was filed and that his whereabouts was not known; the record discloses that he was not served with summons until eleven days after the filing of the bill. The rule announced in *Kindley vs Union Mutual Fire Insurance Company*, supra, finds

that, at which time the court acquires jurisdiction, power of control of the subject matter and parties until final judgment. *See vs Chicago Title & Tr. Co., 308 Ill. 582.*

Furthermore the provision with relation to the policy being void in the event foreclosure proceedings are commenced, with the consent of the insurance company, is inoperative where the insurance company knows of the encumbrance. The declaration states that the first deed provided that the maker thereof would keep all the buildings on said premises insured against loss by fire or tornado and to be approved by the holder of said first deed, in and to the indebtedness described in said first deed and to deliver to the holder of said indebtedness the insurance policies issued by the insurance company on premises herein described, to the said policy of insurance was procured by the said James to comply with the provisions of said first deed. The defendant must have known when attaching the mortgage to the policy in question that it might become necessary for

the mortgagee in order to protect her interest under the mortgage to commence foreclosure proceedings. German Insurance Co. of Freeport vs Churchill, 26 Ill. App. 206; Rostetter vs American Insurance Co. 184 Ill. App. 157-162.

In Getman vs Guardian Fire Insurance Company, 46 Ill. App. 489 the court among other things said: "The contract created by the policy and the added clause, was one between the insurer, the insured and the beneficiary. Their relations to each other were within the contemplation of each contracting party, and neither one should be permitted to avoid a duty imposed by the contract because of the interposition of legal result which, from the nature of the objects to be secured by the contract must have been within the knowledge of all as one likely to follow."

The rule announced in the two cases last above cited is sustained in Rostetter vs. American Insurance Co., 184 Ill. App. 157-162. In Rostetter vs American Insurance Co., supra, it is further said: "Where clauses in an insurance policy are susceptible to two constructions, on conflict, the one most favorable to the insured will be adopted by the courts. In this case there is a conflict between the rights of appellee and appellant as to whether or not appellant's consent must be had before appellee could legally proceed to foreclose her mortgage lien. The object and purpose of appellee in obtaining the mortgage clause to be inserted in the policy in question was to add additional security to the note and mortgage mentioned, and that fact was well understood by appellant at the time the clause was inserted. It must have been equally well understood by appellant that there might be a default in the payment of the mortgage and that a foreclosure proceeding would necessarily follow. To say that appellant's consent was necessary before a foreclosure proceeding could be instituted is in effect to destroy the very object and purpose of the intention of the mortgage clause." There must have been some purpose in the insurance company endorsing on the policy sued on in this case "notice accepted of an encumbrance of \$18,000 on premises herein described."

the mortgagee in order to protect her interest under the mortgage to
insurance foreclosure proceedings. German Insurance Co. of New York
vs. Hirsch, 26 Ill. App. 206; Rostetter vs. American Insurance Co.
Ill. App. 187-188.

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In Rostetter vs. American Insurance Co., supra, it is further
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constructions, one conflict, the one most favorable to the insured
will be adopted by the courts. In this case there is a conflict between
the rights of appellee and appellant as to whether or not appellant's
agent must be had before appellee could legally proceed to foreclose
the mortgage lien. The object and purpose of appellee in obtaining
the mortgage clause to be inserted in the policy in question was to
obtain additional security to the note and mortgage mentioned, and that
it has been equally well understood by appellant that there might
be default in the payment of the mortgage and that a foreclosure
proceeding would necessarily follow. To say that appellant's consent
was necessary before a foreclosure proceeding could be instituted is in
effect to destroy the very object and purpose of the intention of the
policy clause." There must have been some purpose in the insurance
company endorsing on the policy sued on in this case.

It is not sufficient for the defendant to say that there is nothing in the policy to indicate that any interest of the holder of such encumbrance was to be protected or insured by the policy sued upon. The clause in the policy "notice accepted of an encumbrance of \$18,000, on premises herein described" we think was notice of the conditions of the trust deed which were to the effect that the owner of the fee should keep the property insured to the extent of the trust deed for the benefit of the holder thereof and that the loss, if any, should be paid to the holder of the encumbrance. The declaration so charges and the demurrer admits it.

It is also insisted that the plaintiff cannot maintain this suit as receiver. In Chicago Fire Proofing Co., vs The Park National Bank, 145 Ill. 481 it was held that after the appointment of ~~xx~~ a receiver for an insolvent national bank the receiver might maintain an action on a note payable to the bank either in the name of the bank or in his own name or an action might be brought in the name of the bank for the use of the receiver. After the receiver was appointed in the foreclosure proceedings he held the title of the property not only under the trust deed but he also held the title for the holder of the fee and therefore in this cause he represents both the holder of the fee and the title covered by the trust deed and can maintain the suit in his own name as receiver. The policy of insurance in question was issued and the appellant is liable to one or the other of the parties for the amount of the loss sustained and as the receiver represents all of the parties in interest he can maintain the suit.

Everything that was well pleaded was admitted by the filing of the demurrer. The facts as averred state a cause of action which entitles the plaintiff to recover and the court properly overruled the demurrer to the declaration.

The judgment of the circuit court of Mercer County is affirmed.

Judgment Affirmed.

It is not sufficient for the defendant to say that there
nothing in the policy to indicate the any interest of the holder
such endorsement was to be protected or insured by the policy and
The clause in the policy "notice accepted of an endorsement
\$18,000, on as herein described" we think was notice of the
conditions of the first deed which were to the effect that the owner
the fee should keep the property insured to the extent of the trust
for the benefit of the holder thereof and that the loss, if any,
be paid to the holder of the endorsement. The declaration so
and the demurrer admits it.

It is also insisted that the plaintiff cannot maintain
the suit as receiver. In Chicago Fire Insurance Co., vs The Bank
Bank, 145 Ill. 481 it was held that after the appointment
as a receiver for an insolvent national bank the receiver might
maintain an action on a note payable to the bank either in the name
the bank or in his own name or an action might be brought in the
name of the bank for the use of the receiver. After the receiver was
appointed in the foreclosure proceedings he held the title of the
property not only under the first deed but he also held the title
for the holder of the fee and therefore in this case he represents
the holder of the fee and the title covered by the first deed
and can maintain the suit in his own name as receiver. The policy
insurance in question was issued and the appellant is liable to
as the receiver represents all of the parties in interest he can

Everything that was well pleaded was admitted by the filing
the demurrer. The facts as stated state a cause of action which

The judgment of the circuit court of Mercer County is affirmed.
Judgment Affirmed.

STATE OF ILLINOIS,) ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court at Ottawa, this 30th day of
March in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

OCTOBER TERM, A. D. 1925.

THOMAS F. MACK Receiver in
the Matter of ELIZABETH MACK
vs JAMES NOLAN, et al,

Appellee,

vs

THE LIVERPOOL AND LONDON and
GLOBE INSURANCE COMPANY, Ltd.,
a Corporation.

Appellant.

Jett, J.

241 T.A. 631

Appeal from the
Circuit Court of
Mercer County Illinois.

Thomas F. Mack, receiver in the matter of Elizabeth Mack against James Nolan, et al, appellee, instituted this suit against The Liverpool and London and Globe Insurance Company, Ltd., a corporation, appellant, in the circuit court of Mercer county, on a policy of fire insurance. Appellant filed a demurrer to the declaration which was, by the court, overruled and it elected to stand by its demurrer. Evidence was heard and judgment rendered in favor of appellee for \$1,000. the amount of the loss. Appellant prosecutes this appeal.

The only question involved in the case is, did the court err in sustaining the demurrer to the declaration?

For the purpose of this opinion appellee will be called plaintiff and appellant the defendant.

The plaintiff in his declaration charges that the defendant, on, to-wit: the 27th day of February, 1920, in, to-wit: the Village of Viola, Mercer county, Illinois, made its policy of insurance and delivered the same to James Nolan, assured mentioned therein, and for the consideration therein expressed promised the said James Nolan, in the terms of the said policy and the conditions thereto annexed, which said policy and conditions are fully set out in the declaration.

The declaration further charges that on the 19th day of February, 1919, Gustaf Tollenaer was the owner of the real estate on which was located the buildings and property insured, covered by the policy of insurance, and on the said day the said Gustaf Tollenaer and Pauline Tollenaer, his wife, executed a certain trust deed to R. P. Wait, as trustee, to secure the payment of an indebtedness of \$18,000. which said trust deed conveyed to R. P. Wait, trustee, the premises last above mentioned subject to reconveyance upon the payment of said indebtedness of \$18,000., and thereafter the said Gustaf Tollenaer and Pauline Tollenaer his wife, conveyed to James Nolan all their interest in said premises by a deed dated February 26th, 1920.

The plaintiff also sets out in the declaration that on or about the date of the execution of said trust deed to R. P. Wait, Elizabeth Mack for a good and valuable consideration purchased of R. P. Wait the notes secured by the said trust deed together with all the interest of said trustee in said deed and that she then became the owner of the encumbrance on said lands, executed by Gustaf Tollenaer and Pauline Tollenaer his wife and that thereafter, as hereinbefore mentioned, the said James Nolan became the owner of the fee simple title to said lands.

It is further averred by the plaintiff that at the time of the execution and delivery of the policy of insurance on the 27th day of February, 1920, James Nolan was the owner of the fee simple title to said premises and Elizabeth Mack was the owner of the encumbrance against the same and secured by the trust deed.

It is also averred by the plaintiff that it was provided in said trust deed that the maker of the same would keep all the buildings at any time on said premises insured against loss by fire, or tornado in companies to be approved by the holder of said trust deed, in an amount equal to the indebtedness described in said trust deed and would deliver to the holder of said indebtedness th.

insurance policies so written as to require all loss to be applied in the reduction of said indebtedness and the insurance policy hereinabove described as executed on the 27th day of February, 1940, bore on its face the following endorsement, "Notice accepted of an encumbrance of \$18,000., on premises herein described," and the said policy of insurance was procured by the said James Nolan to comply with the provisions of said trust deed.

The plaintiff further charges that on the 9th day of June, 1924 the said Elizabeth Mack was then the owner of the note secured by the trust deed above mentioned, and filed in the circuit court of Mercer County, Illinois, her certain bill of complaint ~~off~~ fore-closure of said trust deed on the premises mentioned in the trust deed and in the said policy of insurance, and in and by said bill of complaint Elizabeth Mack represented to the court that the defendant James Nolan had defaulted in the payment of interest on said indebtedness due her, as well as in the payment of taxes, and that the said James Nolan had left the real estate in question and left Mercer county, and that his place of residence could not be ascertained and at that time she, the said Elizabeth Mack could not ascertain whether the property described in the said trust deed had been insured and prayed the court to appoint a receiver to take charge of said property and to collect the rents from the same.

It is further set forth in the declaration that on the same day, to-wit: the 9th day of June, 1924, the plaintiff, Thomas F. Mack, was appointed receiver in the matter of Elizabeth Mack against James Nolan and the said receiver was ordered and directed by the court to take possession and charge of the real estate, hereinbefore mentioned, to collect the income from the same, to pay for such repairs as might be absolutely necessary, to keep the property insured, to pay the taxes and to bring the balance of the money into court to await the order of the court.

And it is further charged by the plaintiff in the declara-



tion that said order appointing the receiver was made on the 9th day of June, 1924, during the hours the court was in session and before five o'clock in the afternoon; that thereafter on or about ten o'clock in the evening of the same day the barn on the premises described in the said policy and in the trust deed hereinabove mentioned was consumed and destroyed by fire whereby the plaintiff then and there sustained loss and damages to the amount of \$1,000., which said loss and damage did not happen by means of any invasion, insurrection, riot, mob, military or usurped power and the plaintiff says that from the time of the making of said policy and from thence until the happening of the loss and damage hereinabove mentioned, the said Elizabeth Mack had an interest in the said property to the amount of the said sum so insured by the defendant thereon and that at the time of his appointment the plaintiff, as receiver under the order of this Court, had an interest in the said insurance on said property ~~that at the time of said loss he, the plaintiff for the use of Elizabeth Mack was~~ for the use of Elizabeth Mack, and the insured person and that upon said loss the insurance, in the amount of \$1,000. was payable to him and the defendant became then and there indebted to him, the plaintiff, in the said amount of \$1,000. And the plaintiff avers that forth with after the happening of said loss and damage on, to-wit, the 9th day of June, 1924, he gave notice thereof to the defendant and on the 7th day of August, 1924, delivered to the defendant as particular an account of the said loss and damage as the nature of the case would admit accompanied by the oath of the assured, James Nolan, and accompanied by his, plaintiff's oath, that the same was in all respects just and true and showed the value of the said property and in what manner the said building was occupied at the time of the happening of the said loss and damages and did render to the defendant a particular account of loss, stating the date and circumstances of the same, the exact nature of the title of the assured and all others in the property, and by whom and for what purpose said building was occupied at the time of the loss, all encumbrances on the property

and otherwise complied with the provisions of the policy.

It is further avered that by an order of court entered on the 26th day of September, 1924, the plaintiff was ordered and directed by the court to commence an action for the recovery of the loss under the said policy of insurance. Then follows the allegation relative to the addamnum.

It is insisted by the defendant that the court was in error in sustaining the demurrer to the declaration, and it is urged that the policy of insurance did not cover the interest of the holder of the trust deed and for that reason plaintiff is a stranger to the contract and cannot maintain the suit; that the policy provided that if suit was filed to foreclose a mortgage the policy should become null and void and that a suit was filed and for that reason the insurance ceased; that the court was in error in refusing to require the plaintiff to file a bill of particulars.

It is insisted that the court erred in denying defendant's motion for a bill of particulars. The only purpose of a bill of particulars is to advise the defendant of the claim relied upon by the plaintiff for a recovery. In this proceeding there is but one claim relied upon and that is for the loss of the barn in the sum of \$1,000. If a bill of particulars had been filed the only thing which could have been set out would have been a mere repetition of the declaration that the claim was for a loss in the sum of \$1,000. occasioned by the burning of the barn in controversy. No other loss was sued for as is shown by the Declaration. We are of the opinion that the court committed no error in his ruling in refusing to require the plaintiff to file a bill of particulars.

The declaration alleges that the suit was filed on the 9th day of June, 1924, by Elizabeth Mack to foreclose the trust deed in question and this was on the same day on which the receiver was appointed and was during the hours the court was in session and before five o'clock in the afternoon; that thereafter on or about

ten o'clock in the evening of the same day the barn on the premises described in the policy and in the trust deed was consumed and destroyed by fire. It is urged that since the declaration alleges that a bill was filed to foreclose the trust deed before the time of the alleged loss that such commencement of foreclosure suit makes the policy null and void: the policy containing a provision that it shall be void upon the commencement of foreclosure proceedings.

This raises the question, when is a suit in chancery commenced? The purpose of the provision to be construed is to be regarded in determining what shall be considered the commencement of a suit. For some purposes the Statute makes the beginning of a chancery suit the time of the filing of the bill, and many decisions hold that the commencement of a suit in law or chancery is either upon the filing of the bill or on delivery of process to the sheriff, but in every case which we have examined including those cited by appellant wherein the courts have so held the question involved was one of limitations. The only reason for permitting an insurance company to place such a provision in its policy or to cancel its policy when an action to foreclose a mortgage on the property is commenced is because of the extra hazard when the mortgagor knows of an action having been instituted to foreclose the mortgage, and the temptation arises to make an effort to raise money to stop such proceedings.

The authorities relied upon by appellant apply to a situation where the policy of insurance provided that it should be void if foreclosure proceedings were commenced with the knowledge of the insured and in those cases it was held that such provision must be held valid if insurer had such knowledge before loss occurred, on the theory that an extra hazard was created, not contemplated by the contract of insurance. If insured, the mortgagor, did not know proceedings were commenced the policy would not be voided even though it contained such a clause.

This question arose in Findlay vs Union Mutual Fire

Insurance Company, 74 Vermont 211, 52 Atl. 429 and in this case the court said: "The plaintiff also claims that foreclosure proceedings are not commenced, within the meaning of this provision, until the suit is entered in court. The purpose of the provision to be construed is always regarded in determining what shall be considered the commencement of a suit. We think the service of a petition upon the insured must be regarded as the commencement under this provision. It is then that the insured has the knowledge that produces the increase of risk. From that time on he understands that he can avoid the consequences of his default only by making some payment or arrangement, and the moment when he will become convinced of his inability to do this is entirely uncertain. The protection which the provision is designed to secure would not be obtained if the entry of the case was to be treated as the beginning of the suit."

From the above it will be seen that the commencement of the suit, in view of the facts in this case, is not the filing of the bill but is at the time of the service of process upon the insured. We have not been able to find any case except the above one that passes directly upon this question. The declaration charges that Nolan, the defendant, in the foreclosure proceedings, was absent from home at the time the bill was filed and that his whereabouts was not known; the record discloses that he was not served with summons until eleven days after the filing of the bill. The rule announced in Findlay vs Union Mutual Fire Insurance Company, supra, finds support in 26 C. J. 238, sec. 299.

The pendency of a suit begins with the service of process or appearance, at which time the court acquires jurisdiction, power or control of the subject matter and parties until final judgment. Gage vs Chicago Title & Tr. Co., 303 Ill. 569.

Furthermore the provision with relation to the policy becoming void in the event foreclosure proceedings are commenced, with

out the consent of the insurance company, is inoperative where the insurance company knows of the encumbrance. The declaration averred that the trust deed provided that the maker thereof would keep all the buildings on said premises insured against loss by fire or tornado in companies to be approved by the holder of said trust deed, in an amount equal to the indebtedness described in said trust deed and would deliver to the holder of said indebtedness the insurance policies so written as to require all loss to be applied in the reduction of said indebtedness and the insurance policy issued on the 27 th day of February, 1930 bore on its face the following endorsement, "notice accepted of an encumbrance of \$18,000., on premises herein described", and that the said policy of insurance was procured by the said James Nolan to comply with the provisions of said trust deed.

The defendant must have known when attaching the mortgage clause to the policy in question that it might become necessary for the mortgagee in order to protect her interest under the mortgage to commence foreclosure proceedings. German Insurance Co. of Freeport vs Churchill, 26 Ill. App. 806, *Postetter vs. Am. Ins. Co.*, 174.

Dec. 4/11 157-162
In *Getman vs Guardian Fire Insurance Company*, 46 Ill. App. 489 the court among other things said: "The contract created by the policy and the added clause, was one between the insurer, the insured and the beneficiary. Their relations to each other were within the contemplation of each contracting party, and neither one should be permitted to avoid a duty imposed by the contract because of the interposition of legal result which, from the nature of the objects to be secured by the contract must have been within the knowledge of all as one likely to follow."

The rule announced in the two cases last above cited is sustained in *Postetter vs American Insurance Co.*, 184 Ill. App. 157-162. In *Postetter vs American Insurance Co.*, supra, it is further said: "Where clauses in an insurance policy are susceptible of two

constructions, on conflict, the one most favorable to the insured will be adopted by the courts. In this case there is a conflict between the rights of appellee and appellant as to whether or not appellant's consent must be had before appellee could legally proceed to foreclose her mortgage lien. The object and purpose of appellee in obtaining the mortgage clause to be inserted in the policy in question was to add additional security to the note and mortgage mentioned, and that fact was well understood by appellant at the time the clause was inserted. It must have been equally well understood by appellant that there might be a default in the payment of the mortgage and that a foreclosure proceeding would necessarily follow. To say that appellant's consent was necessary before a foreclosure proceeding could be instituted is in effect to destroy the very object and purpose of the intention of the mortgage clause." There must have been some purpose in the insurance company endorsing on the policy sued on in this case "notice accepted of an encumbrance of \$18,000. on premises herein described".

It is not sufficient for the defendant to say that there is nothing in the policy to indicate that any interest of the holder of such encumbrance was to be protected or insured by the policy sued upon. The clause in the policy "notice accepted of an encumbrance of \$18,000., on premises herein described" we think was notice of the conditions of the trust deed which was to the effect that the owner of the fee should deep the property insured to the extent of the trust deed for the benefit of the holder thereof and that the loss, if any, should be paid to the holder of the encumbrance. The declaration so charges and the demurrer admits it.

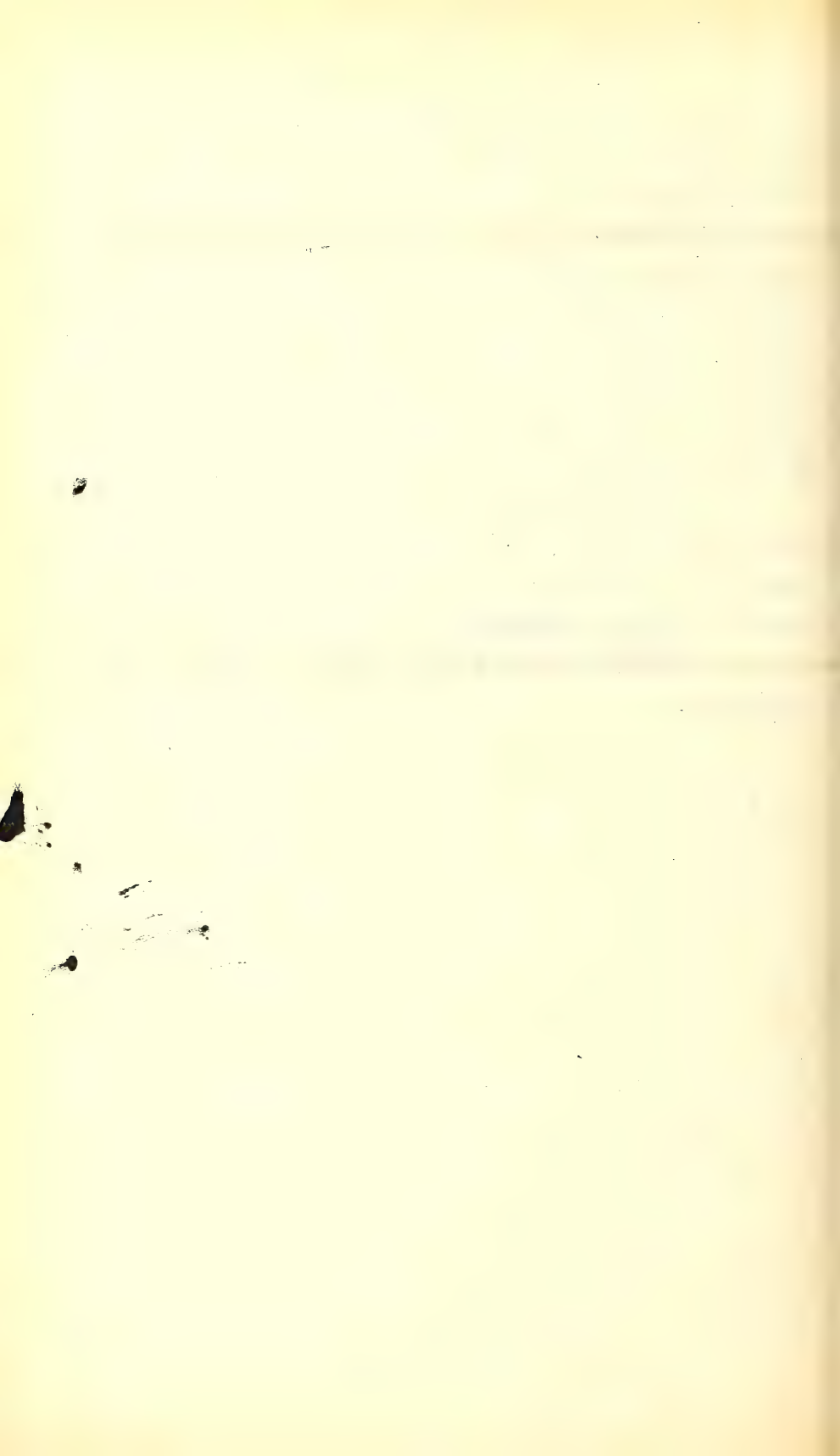
It is also insisted that the plaintiff cannot maintain this suit as receiver. In Chicago Fire Proofing Co., vs The Park National Bank, 145 Ill. 481 it was held that after the appointment of a receiver for an insolvent national bank the receiver might maintain an action on a note payable to the bank either in the name of the bank or in his own name or an action might be brought in the

name of the bank for the use of the receiver. After the receiver was appointed in the foreclosure proceedings he held the title of the property not only under the trust deed but he also held the title for the holder of the fee and therefore in this cause he represents both the holder of the fee and the title covered by the trust deed and can maintain the suit in his own name as receiver. The policy of insurance in question was issued and the appellant is liable to one or the other of the parties for the amount of the loss sustained and as the receiver represents all of the parties in interest he can maintain the suit.

Everything that was well pleaded was admitted by the filing of the demurrer. The facts as averred state a cause of action which entitles the plaintiff to recover and the court properly overruled the demurrer to the declaration.

The judgment of the circuit court of Mercer county is affirmed.

Judgment Affirmed.



Abstract

AT A TERM OF THE APPELLATE COURT,

67 3
Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 631

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term, A.D. 1925.

George H. Koon,

appellee,

vs.

Appeal from the County Court

of Lake County.

George W. Huff and

George O. Teed,

appellants,

241 I.A. 631

Jett, J.

This suit was instituted by George H. Koon, appellee, in the county court of Lake county in April, 1925, to oust the appellants, George W. Huff and George O. Teed, from certain premises they occupied under a lease from appellee.

A trial was had in the county court of said county before a jury and at the conclusion of the evidence Teed was dismissed out of the case, and the court gave an instruction directing a verdict for appellee as to the charge that the appellant Huff had violated the terms of the lease by violating the Illinois Prohibition Law and submitted the question to the jury as to the amount of rent that was due appellee from Huff as tenant. The jury returned a verdict in favor of appellee finding that there was \$1.00 rent due. The court, notwithstanding the verdict of the jury, entered a judgment in favor of appellee and against appellant for the sum of \$500.00 as rent due. It is from the action of the court in directing a verdict as aforesaid, and in rendering judgment in the sum of \$500.00 notwithstanding the finding of the jury that the appellant appeals.

It appears that on December 14th, 1922, George H. Koon, party of the first part, and George W. Huff and George O. Teed, parties of the second part, entered into a contract by which Koon, the appellee, leased to the parties of the second part certain lands and premises described in the lease as the east 75 feet of lot one (1) in block four (4) original plat of Highland Park, Illinois, to be used as a gasoline

241 I. A. 631

This suit was instituted by George H. Koon, appellee, in the county court of Lake county in April, 1932, to oust the appellants, George W. Huff and George O. Teed, from certain premises they occupied under a lease from appellee.

trial was had in the county court of said county before a jury and at the conclusion of the evidence Teed was dismissed out of the case, and the court gave an instruction directing a verdict for appellee as to the charge that the appellant Huff had violated the terms of the lease by violating the Illinois Prohibition Law and established the question to the jury as to the amount of rent that was due appellee from Huff as tenant. The jury returned a verdict in favor of appellee finding that there was \$1.00 rent due. The court, notwithstanding the verdict of the jury, entered a judgment in favor of appellee and against appellant for the sum of \$500.00 as rent due. It is from the action of the court in directing a verdict as aforesaid, that appellant seeks judgment in the sum of \$500.00 notwithstanding the verdict of the jury that the appellant appeals.

It appears that on December 14th, 1932, George H. Koon, party of the first part, and George W. Huff and George O. Teed, parties of the second part, entered into a contract by which Koon, the appellee, leased to the parties of the second part certain lands and premises described in the lease as the east 75 feet of lot one (1) in block four (4) original plat of Highland Park, Illinois, to be used as a gasoline

George H. Koon,
appellee,
vs.
George W. Huff and
George O. Teed,
appellants,
October Term, A.D. 1932.
Appeal from the County Court
of Lake County.

em. No. 7591
Agency 27.

filling station for automobiles and also used to install a greasing and washing rack. Said lease was to run from the 1st day of January, 1923 until the 31st of December, 1923. It was provided in the lease that the parties of the second part should pay to the party of the first part as rent the sum of \$14,550. as follows; \$75 per month for the first six months, \$100.00 per month for the next six months and \$125.00 per month for each month thereafter, all of said payments to be made in advance on the first day of each and every month, the first payment to commence January 1st, 1923. Among other things it was provided in said lease that the parties of the second part should erect and construct upon the said lands and premises a filling station and make certain other improvements unnecessary to be described here. It was further provided that at the expiration of the term of the lease that the party of the first part should purchase and pay the party of the second part for the improvements made upon said premises necessary to be made in order to operate a filling station. It was also provided in said lease as to how the value should be ascertained and determined.

It appears that on the 25th day of April, 1925, appellee brought suit in the county court of said Lake county in an action of forcible detainer and it was charged in the complaint that the defendants had failed to pay the rent as in said lease provided, and there was due, owing and unpaid to the plaintiff, appellee here, for rent the sum of \$827.94, including, in accordance with the terms of said lease, taxes and assessments on said real estate; that plaintiff had notified the defendants in writing of the rent due and payable; that more than five days had elapsed since the notice was served upon the defendants in writing and the defendants had not paid said rent or any part thereof and by virtue thereof the plaintiff is entitled to the possession of said premises and the whole thereof; that the defendant's right to the possession of said above described premises has ceased and determined; that the defendant's right to the possession of said premises has expired by reason of their failure to pay rent.

Filling station for automobiles and also used to install a greasing
and washing rack. Said lease was to run from the 1st day of January,
1932 until the 31st of December, 1933. It was provided in the lease
that the parties of the second part should pay to the party of the
first part as rent the sum of \$14,500. as follows: \$75.00 per month for
the first six months, \$100.00 per month for the next six months and
\$135.00 per month for each month thereafter. All of said payments to
be made in advance on the first day of each and every month, the first
payment to commence January 1st, 1932. Among other things it was
provided in said lease that the parties of the second part should
erect and construct upon the said lands and premises a filling station
and make certain other improvements unnecessary to be described here.
It was further provided that at the expiration of the term of the
lease that the party of the first part should purchase and pay the
party of the second part for the improvements made upon said premises
it was necessary to be made in order to operate a filling station. It was
also provided in said lease as to how the value should be ascertained
and determined.

It appears that on the 28th day of April, 1935, appellee brought
suit in the county court of said Lake County in an action of forcible
detainer and it was charged in the complaint that the defendants had
failed to pay the rent as in said lease provided, and there was due,
owed and unpaid to the plaintiff, appellee here, for rent the sum of
\$17.94, including, in accordance with the terms of said lease, taxes
and assessments on said real estate; that plaintiff had notified the
defendants in writing of the rent due and payable; that more than five
days had elapsed since the notice was served upon the defendants in
writing and the defendants had not paid said rent or any part thereof
and by virtue thereof the plaintiff is entitled to the possession of
said premises and the whole thereof; that the defendants have not
restored to said plaintiff the possession of said premises and the whole
thereof; that the plaintiff is entitled to the possession of said premises and
the whole thereof.

It is further charged in said complaint that the defendants right to possession of the above described premises by virtue of the lease aforesaid has been determined and terminated by reason of their failure to use said premises as is in said lease set forth and provided, and that appellant permitted said premises to be used as a common nuisance and a place where intoxicating liquor is manufactured, kept, sold and bartered in violation of the laws of the United States of America, the State of Illinois and the City of Highland Park.

To the complaint the defendants filed their plea in which they said they were not guilty of forcibly entering and detaining the premises described in the complaint in manner and form as plaintiff complained against them and they put themselves upon the country.

Upon the trial of the case before a jury the testimony disclosed the fact that the amount of rent claimed to be due as set forth in the complaint was in excess of the amount that was as a matter of fact due; that when the notice was served upon the defendants a certified check for \$500.00 was tendered to the officer and he refused to accept the same as he was instructed that unless the entire sum as demanded was paid he should not accept any sum whatever. It was sought on the part of plaintiff to prove a conviction of the appellant George W. Huff of having violated the Prohibition Law. Sec. 71, Chap. 43, Cahill's Statutes, 1921, provides:-

"If any lessee or tenant of any building or premises uses such building or premises, or any part thereof in maintaining a common nuisance, as defined in this Act, or permits such use by another, such use shall work a forfeiture of all rights of the lessee or tenant, and render void the lease or contract of rent upon such building or premises, and shall cause the right of possession to forthwith revert to the owner or lessor, who may make immediate entry upon the premises or may avail himself of any and all remedies, either at law or in equity."

As tending to prove the conviction of the appellant Huff of having violated the Prohibition Law, appellee offered the record showing the filing of an information against George Huff and Harry Hanson in the county court of Lake county; also the record by which bail was fixed and that the defendants were released on recognizance, together with the record of the trial and the verdict of the jury in which the

It is further charged in said complaint that the defendants

right to possession of the above described premises by virtue of the lease aforesaid has been determined and terminated by reason of their failure to use said premises as is in said lease set forth and provided, and that appellant permitted said premises to be used as a common nuisance and a place where intoxicating liquor is manufactured, kept, sold and bartered in violation of the laws of the United States of America, the State of Illinois and the City of Highland Park.

To the complaint the defendants filed their plea in which they said they were not guilty of forcibly entering and detaining the business described in the complaint in manner and form as plaintiff complained against them and they put themselves upon the country. Upon the trial of the case before a jury the testimony disclosed the fact that the amount of rent claimed to be due as set forth in the complaint was in excess of the amount that was as a matter of fact paid; that when the notice was served upon the defendants a certified check for \$500.00 was tendered to the officer and he refused to accept the same as he was instructed that unless the entire sum as demanded was paid he should not accept any sum whatever. It was sought on the part of plaintiff to prove a conviction of the appellant George W. Huff of having violated the Prohibition Law, Chap. VI, Chap. 48, Illinois Statutes, 1921, provides:-

"If any lessee or tenant of any building or premises uses such building or premises, or any part thereof in maintaining a common nuisance, as defined in this Act, or permits such use by another, such use shall work a forfeiture of all rights of the lessee or tenant, and render void the lease or contract of rent upon such building or premises, and shall constitute the right of reversion to the lessor, who may make immediate entry upon the premises and may avail himself of any and all remedies, either at law or in equity."

In pending to prove the conviction of the appellant Huff of having violated the Prohibition Law, appellee offered the record showing the filing of an information against George Huff and Harry Hanson in the County Court of Cook County, Illinois, and the return of a writ of habeas corpus that the defendants were released on recognizance, together with the record of the trial and the verdict of the jury in said case.

jury found the defendant Huff guilty in manner and form as charged in counts 1, 2 and 3 of the information and found the defendant Hanson not guilty. Appellee also offered the judgment of the court, The information was not offered and the excuse for not offering it was that it had become misplaced. Nowhere in the record is it disclosed what the charge was which was preferred against the defendants in the complaint. No order of the court, including the judgment, states of what offense the defendant Huff was convicted. The information not being in the record and not having been introduced, we are unable to say from anything disclosed by the record just what the charge was that the appellant was tried for and of which he was convicted. There is nothing in the record so far as the record testimony indicates to show that the appellant was convicted of any offense committed upon the premises described in the lease. A witness was placed upon the stand who testified that he was a witness on the trial of the case against appellant at the time it is alleged that appellant was convicted of a violation of the Prohibition Law. His testimony is to the effect that he testified before the jury in that case and that when he did so testify he referred to sales on the premises involved in this proceeding. This was offered with a view of undertaking to show that the appellant was convicted of violating the Prohibition Law upon the premises occupied by him as lessee. The defendant testified that he never at any time sold, gave away or illegally possessed intoxicating liquor on the premises described in the complaint.

At the close of the testimony the court upon motion of appellee gave to the jury the following instruction:-

"The jury are instructed that the record of the conviction of the defendant, George W. Huff, having been offered in evidence in this case, such evidence is binding upon you, and the only issue left for your consideration is the amount of rent which was due and owing to the plaintiff on the 6th of April 1925, and you are therefore instructed to find that the plaintiff is entitled to the possession of the premises, described as follows: The east 75 feet of Lot 1 Block 4, original Plat of Highland Park, Highland Park, Illinois."

And also to find in favor of plaintiff for the amount of rent, if any, which you find was due and owing at the beginning of this suit.

...found the defendant Hitt guilty in manner and form as charged in counts 1, 2 and 3 of the information and found the defendant Hanson not guilty. Appellee also offered the judgment of the court. The information was not offered and the excuse for not offering it was that it had become misplaced. Nowhere in the record is it disclosed that the charge was which was preferred against the defendant in the complaint. No order of the court, including the judgment, states that offense the defendant Hitt was convicted. The information not being in the record and not having been introduced, we are unable to say from anything disclosed by the record just what the charge was that the appellant was tried for and of which he was convicted. There is nothing in the record so far as the record testimony indicates to show that the appellant was convicted of any offense committed upon the premises described in the lease. A witness was placed upon the stand who testified that he was a witness on the trial of the case against appellant at the time it is alleged that appellant was convicted of a violation of the Prohibition Law. His testimony is to the effect that he testified before the jury in that case and that when he did so testify he referred to sales on the premises involved in this proceeding. This was offered with a view of undertaking to show that the appellant was convicted of violating the Prohibition Law upon the premises occupied by him as lessee. The defendant testified that he never at any time sold, gave away or illegally possessed intoxicating liquor on the premises described in the complaint. At the close of the testimony the court upon motion of appellee gave to the jury the following instruction:-

"The jury are instructed that the record of the conviction of the defendant, George W. Hitt, having been offered in evidence in this case, such evidence is binding upon you, and the only issue left for your consideration is the amount of rent which was due and owing to the plaintiff on the 6th of April 1935, and you are therefore instructed to find that the plaintiff is entitled to the possession of the premises described as follows: The east 75 feet of Lot 1 Block 4, original plat of Highland Park, Highland Park, Illinois."

...also to find in favor of plaintiff for the amount of rent, if any, which you find was due and owing at the beginning of this suit.

Then they were given a form of the verdict accordingly,

The appellant asked the court to give to the jury the form of verdict on his part as follows:

"The court instructs you that if you find the issues joined in favor of the defendant, the form of your verdict may be, "We the jury, find the defendant not guilty:"

This the court refused to give.

The court, notwithstanding the verdict of the jury, finding that there was \$1.00 rent due the appellee, set the verdict aside and rendered judgment in favor of appellee for \$500.00. This was done on the theory as contended for by appellee that the testimony disclosed that there were at least four months rent due at the rate of \$125.00 per month. The testimony, however, further disclosed that in April, 1925, there was due to appellant from appellee for oil and gas the sum of \$191.00; that previous to this time appellant and appellee got together and would strike a balance and appellant would pay the difference that was owing by him as rent. This was not done at all times but the testimony discloses that it had been done by the parties previous to the institution of this suit.

Since the information does not appear in the record and was not introduced and as the record nowhere recites or informs us of what offense the defendant was convicted, we are not prepared to say under the rule as we understand it, that the proof of former conviction has been established. Before it could be insisted that the appellant had been convicted of the violation of the prohibition law and thereby violated the terms and provisions of the lease, it would be necessary for the record to disclose of what offense the appellant had been convicted. In order to consider the record evidence as offered, it was necessary in the first instance to introduce the information that was the basis of the prosecution. Before the part of the record that was offered and admitted could be properly considered by the jury and before the court would be authorized to direct a verdict, it was necessary for the proof to establish the fact that appellant had been

and they were given a form of the verdict accordingly,

The appellant asked the court to give to the jury the form of

verdict on his part as follows:

"The court instructs you that if you find the issues joined in favor of the defendant, the form of your verdict may be, 'We the jury, find the defendant not guilty.'"

but the court refused to give.

The court, notwithstanding the verdict of the jury, finding that

there was \$1.00 rent due the appellee, set the verdict aside and rendered

judgment in favor of appellee for \$500.00. This was done on the

theory as contended for by appellee that the testimony disclosed that

there were at least four months rent due at the rate of \$125.00 per

month. The testimony, however, further disclosed that in April, 1935,

there was due to appellant from appellee for oil and gas the sum of

\$1.00; that previous to this time appellant and appellee got together

and would strike a balance and appellant would pay the difference

that was owing by him as rent. This was not done at all times but the

testimony discloses that it had been done by the parties previous to

the institution of this suit.

Since the information does not appear in the record and was not

introduced and as the record nowhere recites or informs us of what

the defendant was convicted, we are not prepared to say under

the rule as we understand it, that the proof of former conviction has

been established. Before it could be insisted that the appellant had

been convicted of the violation of the prohibition law and thereby

violated the terms and provisions of the lease, it would be necessary

for the record to disclose of what offense the appellant had been

convicted. In order to consider the record evidence as offered, it

was necessary in the first instance to introduce the information that

was the basis of the prosecution. Before the part of the record that

was offered and admitted could be properly considered by the jury and

therefore the court would be authorized to direct a verdict, it was nec-

essary for the proof to establish the fact that appellant had been

convicted of an offense and that in order to establish that fact by the record it was incumbent in the first instance to offer the information against him. *Kerby v. The People*, 123 Ill. 436; *People v. Andre*, 295 Ill. 445.

There is no finding in the record appellant had forfeited the lease and appellee was entitled to the possession of the premises in question, except the verdict of the jury, based upon the peremptory instruction that the appellant had violated the Prohibition Law. The court erred in giving the peremptory instruction and it was error for the court to enter any judgment at all for rent for the reason that if there was no forfeiture there could be no recovery of possession or rent.

The judgment of the county court of Lake county is therefore reversed and remanded.

Reversed and Remanded.

the record it was incumbent in the first instance to offer the

information against him. *Kerby v. The People*, 123 Ill. 438; 2

W. Angele, 235 Ill. 448.

There is no finding in the record appellant had forfeited the

lease and appellee was entitled to the possession of the premises in

question, except the verdict of the jury, based upon the peremptory

instruction that the appellant had violated the Prohibition Law. The

court erred in giving the peremptory instruction and it was error

for the court to enter any judgment at all for rent for the reason

that if there was no forfeiture there could be no recovery of possession.

It is so ordered.

The judgment of the county court of Lake county is therefore

reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS,) ss. I. JUSTUS L. JOHNSON, Clerk of the Appellate Court.
SECOND DISTRICT.)
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty- six.

Justus L. Johnson
Clerk of the Appellate Court.

OCTOBER TERM, A. D. 1925.

GEORGE H. KOON,

Appellee,

vs

GEORGE W. HUFF and
GEORGE O. TEED,

Appellants.

241 I.A. 631

Appeal from the
County Court of
Lake County.

Jett, J.

This suit was instituted by George H. Koon, appellee, in the county court of Lake county in April, 1925, to oust the appellants George W. Huff and George O Teed from certain premises they occupied under a lease from appellee.

A trial was had in the county court of said county before a jury and at the conclusion of the evidence Teed was dismissed out of the case, and the court gave an instruction directing a verdict for appellee as to the charge that the appellant Huff had violated the terms of the lease by violating the Illinois Prohibition Law and submitted the question to the jury as to the amount of rent that was due appellee from Huff as tenant. The jury returned a verdict in favor of appellee finding that there was 1.00 rent due. The court, notwithstanding the verdict of the jury, entered a judgment in favor of appellee and against appellant for the sum of \$500.00 as rent due. It is from the action of the court in directing a verdict as aforesaid, and in rendering judgment in the sum of \$500.00 notwithstanding the finding of the jury that the appellant appeals.

It appears that on December 14th, 1922, George H. Koon,

party of the first part, and George W. Huff and George C. Teed, parties of the second part, entered into a contract by which Koon, the appellee, leased to the parties of the second part certain lands and premises described in the lease as the east 75 feet of lot one (1) in block four (4) original plat of Highland Park, Illinois, to be used as a gasoline filling station for automobiles and also used to install a greasing and washing rack. Said lease was to run from the 1st day of January, 1923 until the 31st of December, 1932. It was provided in the lease that the parties of the second part should pay to the party of the first part as rent the sum of \$14,550. as follows; \$75 per month for the first six months, 100.00 per month for the next six months and 125.00 per month for each month thereafter, all of said payments to be made in advance on the first day of each and every month, the first payment to commence January 1st, 1923. Among other things it was provided in said lease that the parties of the second part should erect and construct upon the said lands and premises a filling station and make certain other improvements unnecessary to be described here. It was further provided that at the expiration of the term of the lease that the party of the first part should purchase and pay the party of the second part for the improvements made upon said premises necessary to be made in order to operate a filling station. It was also provided in said lease as to how the value should be ascertained and determined.

It appears that on the 25th day of April, 1925, appellee brought suit in the county court of said Lake county in an action of forcible detainer and it was charged in the complaint that the defendants had failed to pay the rent as in said lease provided, and there was due, owing and unpaid to the plaintiff, appellee here, for rent the sum of \$827.94, including, in accordance with the terms of said lease, taxes and assessments on said real estate; that plaintiff

had notified the defendants in writing of the rent due and payable; that more than five days had elapsed since the notice was served upon the defendants in writing and the defendants had not paid said rent or any part thereof and by virtue thereof the plaintiff is entitled to the possession of said premises and the whole thereof; that the defendant's right to the possession of said above described premises has ceased and determined; that the defendant's right to the possession of said premises has expired by reason of their failure to pay rent.

It is further charged in said complaint that the defendants right to possession of the above described premises by virtue of the lease aforesaid has been determined and terminated by reason of their failure to use said premises as is in said lease set forth and provided, and that appellant permitted said premises to be used as a common nuisance and a place where intoxicating liquor is manufactured, kept, sold and bartered in violation of the laws of the United States of America, the State of Illinois and the City of Highland Park.

To the complaint the defendants filed their plea in which they said they were not guilty of forcibly entering and detaining the premises described in the complaint in manner and form as plaintiff complained against them and they put themselves upon the country.

Upon the trial of the case before a jury the testimony disclosed the fact that the amount of rent claimed to be due as set forth in the complaint was in excess of the amount that was as a matter of fact due; that when the notice was served upon the defendants a certified check for 500.00 was tendered to the officer and he refused to accept the same as he was instructed that unless the entire sum as demanded was paid he should not accept any sum whatever. It was sought on the part of plaintiff to prove a conviction of the appellant George W. Huff of having violated the Prohibition Law. Sec. 71, Chap. 43, Cahill's Statutes, 1921

provides:

"If any lessee or tenant of any building or premises uses such building or premises, or any part thereof in maintaining a common nuisance, as defined in this Act, or permits such use by another, such use shall work a forfeiture of all rights of the lessee or tenant, and render void the lease or contract of rent upon such building or premises, and shall cause the right of possession to forthwith revert to the owner or lessor, who may make immediate entry upon the premises or may avail himself of any and all remedies, either at law or in equity."

As tending to prove the conviction of the appellant Huff of having violated the Prohibition Law, appellee offered the record showing the filing of an information against George Huff and Harry Hanson in the county court of Lake county; also the record by which bail was fixed and that the defendants were released on recognizance, together with the record of the trial and the verdict of the jury in which the jury found the defendant Huff guilty in manner and form as charged in counts 1, 2 and 3 of the information and found the defendant Hanson not guilty. Appellee also offered the judgment of the court. The information was not offered and the excuse for not offering it was that it had become misplaced. Nowhere in the record is it disclosed what the charge was which was preferred against the defendants in the complaint. No order of the court, including the judgment, states of what offense the defendant Huff was convicted. The information not being in the record and not having been introduced, we are unable to say from anything disclosed by the record just what the charge was that the appellant was tried for and of which he was convicted. There is nothing in the record so far as the record testimony indicates to show that the appellant was convicted of any offense committed upon the premises described in the lease. A witness was placed upon the stand who testified that he was a witness on the trial of the case against appellant at the time it is alleged that appellant was convicted of a violation of the Prohibition Law. His testimony is to the effect that he

testified before the jury in that case and that when he did so testify he referred to sales on the premises involved in this proceeding. This was offered with a view of undertaking to show that the appellant was convicted of violating the Prohibition Law upon the premises occupied by him as lessee. The defendant testified that he never at any time sold, gave away or illegally possessed intoxicating liquor on the premises described in the complaint.

At the close of the testimony the court upon motion of appellee gave to the jury the following instruction:-

"The jury are instructed that the record of the conviction of the defendant, George W. Huff, having been offered in evidence in this case, such evidence is binding upon you, and the only issue left for your consideration is the amount of rent which was due and owing to the plaintiff on the 6th of April 1925, and you are therefore instructed to find that the plaintiff is entitled to the possession of the premises, described as follows: The east 75 feet of Lot 1 Block 4, original Plat of Highland Park, Highland Park, Illinois."

And also to find in favor of plaintiff for the amount of rent, if any, which you find was due and owing at the beginning of this suit. Then they were given a form of the verdict accordingly.

The appellant asked the court to give to the jury the form of verdict on his part as follows:

"The court instructs you that if you find the issues joined in favor of the defendant, the form of your verdict may be, "We the jury, find the defendant not guilty!"

This the court refused to give.

The court, notwithstanding the verdict of the jury, finding that there was \$1.00 rent due the appellee, set the verdict aside and rendered judgment in favor of appellee for \$500.00. This was done on the theory as contended for by appellee that the testimony disclosed that there were at least four months rent due at the rate of \$125.00 per month. The testimony, however, further disclosed that in April, 1925, there was due to appellant from appellee for oil and gas the sum of \$191.00; that previous to this time appellant and appellee got together and would strike a balance and appellant would

pay the difference that was owing by him as rent. This was not done at all times but the testimony discloses that it had been done by the parties previous to the institution of this suit.

Since the information does not appear in the record and was not introduced and as the record nowhere recites or informs us of what offense the defendant was convicted, we are not prepared to say under the rule as we understand it, that the proof of former conviction has been established. Before it could be insisted that the appellant had been convicted of the violation of the prohibition law and thereby violated the terms and provisions of the lease, it would be necessary for the record to disclose of what offense the appellant had been convicted. In order to consider the record evidence as offered, it was necessary in the first instance to introduce the information that was the basis of the prosecution. Before the part of the record that was offered and admitted could be properly considered by the jury and before the court would be authorized to direct a verdict, it was necessary for the proof to establish the fact that appellant had been convicted of an offense and that in order to establish that fact by the record it was incumbent in the first instance to offer the information against him. *Kerby vs The People*, 123 Ill. 436; *People vs Andre*, 295 Ill. 445.

There is no finding in the record appellant had forfeited the lease and appellee was entitled to the possession of the premises in question, except the verdict of the jury, based upon the peremptory instruction that the appellant had violated the Prohibition Law. The court erred in giving the peremptory instruction and it was error for the court to enter any judgment at all for rent for the reason that if there was no forfeiture there could be no recovery of possession or rent.

The judgment of the county court of Lake county is therefore reversed and remanded.

Reversed and Remanded.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 631

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Gilbert Vennum,

Appellant,

241 I.A. 331

vs.,

Appeal from the Circuit
Court of Iroquois County.

W. D. Littell, Commissioner
of Highways of the Town of
Belmont, County of Iroquois
and State of Illinois,

Appellee.

Jett, J.

Gilbert Vennum, appellant, filed a bill in the Circuit Court of Iroquois county against W. D. Littell, Commissioner of Highways of the Town of Belmont in the county of Iroquois, appellee, for an injunction to restrain him from vacating and closing a certain public highway described in the bill. A demurrer was interposed to the bill and the same was sustained. An amended bill was filed to which the appellee demurred, and the demurrer was sustained. The amended bill was dismissed for want of equity and a decree was so entered and this appeal has been prosecuted from that decree.

The bill sets up the fact that the highway in question has been in use for many years and alleges the various proceedings that were had by appellee to vacate the same. It is the contention, however, of appellant that certain irregularities exist in the proceedings and that they were not in accordance with the statute and therefore were illegal and void and that the appellee should be restrained from vacating the road in question.

After the petition had been presented to the Commissioner of Highways to vacate the road in controversy he gave the following notice: "And said Commissioner does hereby give notice that he has fixed the 26th day of October A. D. 1925, at the hour of 10 o'clock in the forenoon at the west termini of said above road in said town as the time when, and the place where he will meet to examine the route of said road and hear reasons for or against the vacating of the same at which time and place all persons interested will be heard."

241 I. A. 631

Appeal from the Circuit
Court of Irons County.

Appellant,

vs.
D. D. Little, Commissioner
of Highways of the Town of
Belmont, County of Irons,
State of Illinois.

Appellee.

Gilbert Vennum, appellant, filed a bill in the Circuit

Court of Irons County against D. D. Little, Commissioner of

Highways of the Town of Belmont in the County of Irons, appellee,

for an injunction to restrain him from vacating and closing a certain

road, the way described in the bill. A demurrer was interposed to

the bill and the same was sustained. An amended bill was filed to

amend the appellee demurred, and the demurrer was sustained. The

bill was dismissed for want of equity and a decree was so

entered and this appeal has been prosecuted from that decree.

The bill sets up the fact that the highway in question has

been in use for many years and alleges the various proceedings that

were had by appellee to vacate the same. It is the contention, however,

that appellant that certain irregularities exist in the proceedings and

that they were not in accordance with the statute and therefore were

illegal and void and that the appellee should be restrained from

vacating the road in question.

After the petition had been presented to the Commission

to vacate the road in controversy he gave the following

notice: "And said Commissioner does hereby give notice that he has

on the 26th day of October A. D. 1928, at the hour of 10 o'clock

forenoon at the west terminus of said above road in said town

and the place where he will meet to

hear and hear reasons for or against the vacating of

the road at which time and place all persons interested will be heard."

The notice was dated October 3rd, 1923 and signed by the Commissioner of Highways.

The notice as set forth in the amended bill of complaint and as posted fixed the place for holding the first meeting as the west terminus of the road to be vacated and appellant contends, as we understand his argument, that the Commissioner met 365 feet south of the west terminus of said road as described in said petition.

Conceding that the description of the road sought to be vacated was irregular and that the description was not technically correct yet the fact remains that the petition did conform to the statute by having the requisite number of signatures, by setting out a description of said road and that the highway commissioner by posting his notice of the place where, and the time when, he would meet to examine the route of said road and hear reasons for and against the vacating the same acquired jurisdiction of the proceedings, and having once acquired jurisdiction the proceeding cannot be attacked collaterally but must be attacked by a direct proceeding. *Bailey et al vs McCain et al*, 92 Ill. 277.

Although a description of the road proposed to be vacated is not as definite as it should be still this fact does not deprive the Commissioner of jurisdiction which he obtained by the presentation of a petition and the posting of notices thereof. *Bailey vs McCain*, supra.

The Commissioner having acquired jurisdiction his acts are valid until set aside or reversed in some direct proceeding, for that purpose. *Bailey vs McCain*, supra.

The demurrer to the amended bill was evidently sustained for the reason that the court was without jurisdiction to entertain it. The statute provides a certain method by which a public highway may be vacated. It also provides for an appeal from the decision of the Commissioner of Highways to vacate a highway which appellant could have taken to the County Superintendent of Highways. It does not appear from the decree in this proceeding that any appeal was prosecuted by appellant or that he took advantage of the remedy provided by law.

notice was dated October 27, 1923 and signed by the Commissioner of Highways.

The notice was set forth in the amended bill of complaint as posted fixed the place for holding the first meeting as the west terminus of the road to be vacated and appellant contends, as we understand his argument, that the Commissioner met 363 feet south of the east terminus of said road as described in said petition.

Concerning that the description of the road sought to be vacated was irregular and that the description was not technically correct yet the fact remains that the petition did conform to the statute by having the requisite number of signatures, by setting out

the notice of the place where, and the time when, he would meet to examine the route of said road and hear reasons for and against the vacating the same acquired jurisdiction of the proceedings, and having acquired jurisdiction the proceeding cannot be attacked collaterally, but must be attacked by a direct proceeding. Bailey et al vs Mc-

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Although a description of the road proposed to be vacated is not as definite as it should be still this fact does not deprive the Commissioner of jurisdiction. The Commissioner having acquired jurisdiction his acts are valid until set aside or reversed in some direct proceeding, for that reason. Bailey vs McGinn, supra.

The demurrer to the amended bill was evidently sustained for the reason that the bill does not state the jurisdiction of the Commissioner of Highways to vacate a highway which appellant could have asserted. It also provides for an appeal from the decision of the Commissioner to the County Superintendent of Highways. It does not appear

It was the duty of appellant if he felt aggrieved to prosecute his remedy at law by appeal and the court was without jurisdiction to entertain a bill for an injunction. The appellant also had another adequate remedy at law by a certiorari proceeding. Caldwell vs. Moffatt, 215 Ill. App. 583.

We are of the opinion that the Circuit Court of Iroquois County was correct in its ruling sustaining the demurrer. The judgment of the Circuit Court of Iroquois County will therefore be affirmed.

Judgment Affirmed.

It was the duty of appellant if he felt aggrieved to prosecute his
remedy at law by appeal and the court was without jurisdiction to
interstain a bill for an injunction. The appellant also had another
separate remedy at law by a certiorari proceeding. Caldwell vs.

188 Ill. App. 585.

We are of the opinion that the Circuit Court of Indiana
County was correct in its ruling sustaining the demurrer. The
Circuit Court of Indiana County will therefore be

Judgment Affirmed.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
March in the year of our Lord one thousand
nine hundred and twenty-^{six}.

Justus L. Johnson
Clerk of the Appellate Court.

THE OCTOBER TERM 1925.

7594

Agenda 60.

GILBERT VENNUM,

Appellant,

vs

Appeal from
the Circuit Court of
Iroquois County.

W. D. LITTELL, Commissioner
of Highways of the Town of
Belmont, County of Iroquois
and State of Illinois.

Appellee.

Jett, J.

Gilbert Vennum, appellant, filed a bill in the Circuit Court of Iroquois county against W. D. Littell, Commissioner of Highways of the Town of Belmont in the county of Iroquois, appellee, for an injunction to restrain him from vacating and closing a certain public highway described in the bill. A demurrer was interposed to the bill and the same was sustained. An amended bill was filed to which the appellee demurred, and the demurrer was sustained. The amended bill was dismissed for want of equity and a decree was so entered and this appeal has been prosecuted from that decree.

The bill sets up the fact that the highway in question has been in use for many years and alleges the various proceedings that were had by appellee to vacate the same. It is the contention, however, of appellant that certain irregularities exist in the proceedings and that they were not in accordance with the statute and therefore were illegal and void and that the appellee should be restrained from vacating the road in question.

After the petition had been presented to the Commissioner of Highways to vacate the road in controversy he gave the following notice: "And said Commissioner does hereby give notice that he has fixed the 26th day of October A. D. 1923, at the hour of 10 o'clock in the forenoon at the west termini of said above road in said town as the time when, and the place where he will meet to examine the

THE OCTOBER TERM 1925.

Agenda 60.

MINUTES

Appellant,

Appeal from
the Circuit Court of
Tipton County.

W. D. LITTLE, Commissioner
of Highways of the Town of
Belmont, County of Tipton,
State of Illinois.

Appellee.

Gilbert Vannum, appellant, filed a bill in the Circuit
Court of Tipton County against W. D. Little, Commissioner of
Highways of the Town of Belmont in the County of Tipton, Illinois,
for injunction to restrain him from vacating and closing a certain
highway described in the bill. A demurrer was interposed to
the bill and the same was sustained. An amended bill was filed to
the effect that the appellee demurred, and the demurrer was sustained. The
amended bill was dismissed for want of equity and a decree was so
entered and this appeal has been prosecuted from that decree.
The bill sets up the fact that the highway in question
has been in use for many years and alleges the various proceedings
that were had by appellee to vacate the same. It is the contention
of appellant that certain irregularities exist in the pro-
ceedings and that they were not in accordance with the statute and
therefore were illegal and void and that the appellee should be
restrained from further proceedings.
The bill further alleges that in controversy he gave the following
notice: "And said Commissioner does hereby give notice that he has
fixed the 28th day of October A. D. 1925, at the hour of 10 o'clock
in the forenoon at the west terminal of said above road in said town
at the time then, and the place where he will meet to examine the

route of said road and hear reasons for or against the vacating of the same at which time and place all persons interested will be heard." The notice was dated October 3th, 1923 and signed by the Commissioner of Highways.

The notice as set forth in the amended bill of complaint and as posted fixed the place for holding the first meeting as the west terminus of the road to be vacated and appellant contends, as we understand his argument, that the Commissioner met 365 feet south of the west terminus of said road as described in said petition.

Conceding that the description of the road sought to be vacated was irregular and that the description was not technically correct yet the fact remains that the petition did ~~not~~ conform to the statute by having the requisite number of signatures, by setting out a description of said road and that the highway commissioner by posting his notice of the place where, and the time when, he would meet to examine the route of said road and hear reasons for and against the vacating the same acquired jurisdiction of the proceedings, and having once acquired jurisdiction the proceeding cannot be attacked collaterally but must be attacked by a direct proceeding. Bailey et al vs McCain et.al, 92 Ill. 277.

Although a description of the road proposed to be vacated is not as definite as it should be still this fact does not deprive the Commissioner of jurisdiction which he obtained by the presentation of a petition and the posting of notices thereof. Bailey vs McCain, supra.

The Commissioner having acquired jurisdiction his acts are valid until set aside or reversed in some direct proceeding. for that purpose. Bailey vs McCain, supra.

The demurrer to the amended bill was evidently sustained for the reason that the court was without jurisdiction to entertain it. The statute provides a certain method by which a public highway may be vacated. It also provides for an appeal from the decision of the Commissioner of Highways to vacate a highway which appellant could have

of said road and best reasons for or against the vacating of

at which time and place all persons interested will be

The notice was dated October 8th, 1928 and signed by the

Commissioner of Highways.

The notice as set forth in the amended bill of complaint and

located fixed the place for holding the first meeting as the west

of the road to be vacated and appellant contends, as we under-

the Commissioner met 365 feet south of the

of said road as described in said petition.

Conceding that the description of the road sought to be

was irregular and that the description was not technically

yet the law

by having the requisite number of signatures, by setting out a

of said road and that the highway commissioner by posting

of the place where, and the time when, he would meet to ex-

the route of said road and best reasons for and against the

the same acquired jurisdiction of the proceedings, and having

acquired jurisdiction the proceeding cannot be attacked collater-

it must be attacked by a direct proceeding. Bailey et al vs Mc

et al, 28 Ill. 277.

Although a description of the road proposed to be vacated is

as definite as it could be still this fact does not deprive the

of jurisdiction which he obtained by the presentation of a

and the posting of notices thereof. Bailey vs McGinn, supra.

The Commissioner having acquired jurisdiction his acts are

will set aside or reversed in some direct proceeding for that

Bailey vs McGinn, supra.

The demand for the amended bill was evidently sustained for

that the court was without jurisdiction to entertain it.

provides a certain method by which a public highway may

It also provides for an appeal from the decision of the

of Highways to vacate a highway which appellant could have

taken to the County Superintendant of Highways. It does not appear from the decree in this proceeding that any appeal was prosecuted by appellant or that he took advantage of the remedy provided by law. It was the duty of appellant if he felt aggrieved to prosecute his remedy at law by appeal and the court was without jurisdiction to entertain a bill for an injunction. The appellant also had another adequate remedy at law by a certorari proceeding. Caldwell vs Moffatt, 215 Ill. App. 583.

We are of the opinion that the Circuit Court of Iroquois county was correct in its ruling sustaining the demurrer. The judgment of the Circuit Court of Iroquois county will therefore be affirmed.

Judgment Affirmed.

to the County Superintendent of Highways. It does not appear
therein in this proceeding that any appeal was prosecuted by
or that he took advantage of the remedy provided by law.

and also had another
The bill for an injunction. The
Galbreath vs. McFarrell

App. 583.

We are of the opinion that the Circuit Court of Cook County
is correct in its ruling sustaining the writ. The
of the Circuit Court of Cook County will therefore be

Judgment Affirmed.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 631

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

To the October Term A. D. 1925

63

7597

The American Laundry Machinery
Company, a foreign corporation,

Defendant in error,

vs.

Aurora Wet Wash Laundry Company,
an Illinois corporation,

Plaintiff in error.

Writ of error from
the Circuit Court
of Kane County.

241 I.A. 631

Jett, J.

This is a suit in assumpsit brought by the American Laundry Machinery Company, a foreign corporation, defendant in error, hereinafter referred to as the plaintiff, to recover, from the Aurora Wet Wash Laundry Company of Aurora Illinois, plaintiff in error, hereinafter referred to as the defendant, the purchase price of a washing machine and an extractor which it is claimed the defendant was obligated to pay to the plaintiff by virtue of the sale and delivery to it of the washing machine and extractor in pursuance of the following order:

"WRE 10-19-

M 9-20

The American Laundry Machinery Co.
208 West Monroe Street, Chicago, Ill.

Order No. 43

Sept. 16, 1922

Please ship the following at prices and conditions
named below:

Ship to Aurora Wet Wash Ldy. Co.
Aurora, Illinois.

How Ship--

When --

Terms \$175.00 with Order \$... B.L. Attached

Balance in equal monthly rates of \$52.50 at 6% covered by
Insurance and Mortgage.

These goods are sold F.O.B. cars at

Kalamazoo, Mich.

Cash Discounts apply on Net amount of Contract.

Where electric equipment is used, fill in Current
and Voltage:

.....Volts, D.C.A.C. CyclePhase.

1-40x84" eight rocket Detroit Ldy. Mch. Co.

Wood washer, with four cylinder doors horizontal

partition, with 2 tub doors, double glassed Elev

header hand Wheel attached equipped with Huebach

2" Auto water valve attached 4" outlet\$450.00

To the October Term A. D. 1925

63

The American Laundry Machinery Company, a foreign corporation,

Defendant in error,

vs.

Aurora Wet Wash Laundry Company, an Illinois corporation,

Plaintiff in error.

Writ of error from the Circuit Court of Kane County.

241 I.A. 631

This is a writ in assumpsit brought by the American Laundry Machinery Company, a foreign corporation, defendant in error, herein referred to as the plaintiff, to recover, from the Aurora Wet Wash Laundry Company of Aurora, Illinois, plaintiff in error, herein referred to as the defendant, the purchase price of a washing machine and an extractor which it is claimed the defendant was obligated to pay to the plaintiff by virtue of the sale and delivery of the washing machine and extractor in pursuance of the following

"WHE 10-12-

M 2-20

The American Laundry Machinery Co.
208 West Monroe Street, Chicago, Ill.

Sept. 16, 1925

Order No. 43

Please ship the following at prices and conditions named below:

Ship to Aurora Wet Wash Ldy. Co.
Aurora, Illinois.

When

Now ship-- Terms \$15.00 with Order \$... B.L. Attached
Balance in equal monthly rates of \$52.50 at 6% covered by

insurance and mortgage.
These goods are sold F.O.B. cars at

Kalamazoo, Mich.
Cash discounts apply on net amount of contract.

Where electric equipment is used, fill in current
and voltage:

.....Volts D.C.A.C. CyclePhase.
"10x84" eight pocket Detroit Ldy. Mch. Co.

wood washer, with four cylinder doors horizontal
rotation, with 2 tub doors, double glassed Elev
water hand wheel attached equipped with Huesbeck
into water valve attached 4" outlet \$150.00

2-hand and sold as is ---

1-American 26" Extractors with Straight countershaft

2" hand and Sold as is \$250.00
750.00

C. E. Fiske

Conditions to Which the Purchaser Agrees:-

The above goods shall remain the property of The American Laundry Machinery Company, and title thereto shall not vest in vendee until entire purchase price and notes are paid; shall remain personal property and not become part of any real estate however attached, and shall be at all times fully insured by vendee, insurance payable to vendor as its interest may appear. Destruction of goods by fire shall not release payments, except to the extent of insurance money actually paid to vendor. Any machinery taken in exchange to be crated and delivered to vendor at depot by vendee. All unpaid installments of purchase price and notes shall at vendor's option, become forthwith due on default for payment of any one of them. Vendor is not liable for delay or failure of delivery caused by strikes or other causes beyond its control. The purchaser to pay all taxes levied on account of said property. This order is subject to acceptance by vendor at home or division office and expresses the entire contract, and no verbal agreements or warranties shall be binding, and the undersigned acknowledges the receipt of a copy hereof.

Aurora Wet Wash Laundry
Anton Fajfar.

Witnesses:

C. B. Fiske."

The plaintiff filed the common counts to which declaration the defendant pleaded the general issue with affidavit of merits and gave notice that on the trial of the case it would rely upon the following matters by way of defense:- That defendant ordered of the plaintiff a wood washer manufactured by The American Laundry Machinery Company, but the plaintiff, disregarding said order, fraudently delivered to defendant a wood washer of an entirely different and greatly inferior make; that as part of said order of said laundry machinery the plaintiff, by its duly authorized agent, expressly warranted that said machinery so ordered, though second-hand, would run as well and do the work for which it was ordered as effectively as new machinery, and also agreed that if it did not, plaintiff would make it do so, and defendant, relying upon said warranty, ordered said laundry machinery; that as part of the contract of purchase of said machinery the defendant, by its duly authorized agent, agreed to install the same and put it in good running order; that when defendant discovered that said machinery was not of the kind or make ordered, it

2nd hand and sold as is ---
 1-American 2d "Kutson" with straight counterpane
 1st hand and sold as is ---
 1st hand and sold as is ---
 1st hand and sold as is ---

O. E. Wake
 Conditions to Which the Purchaser Agrees:
 The above goods shall remain the property of The American Laundry Machinery Company, and title thereto shall not vest in vendee until entire purchase price and notes are paid; shall remain personal property and not become part of any real estate, however attached, and shall be at all times fully insured by vendee, insurance payable to vendor as its interest may appear. Destruction of goods by fire shall not release payments, except to the extent of insurance money actually paid to vendor. Any machinery taken in exchange to be created and delivered to vendor at depot by vendee. All unpaid installments of purchase price and notes shall be vendor's option, become forthwith due on default for payment of any one of them. Vendor is not liable for delay or failure of delivery caused by strikes or other causes beyond its control. The purchaser to pay all taxes levied on account of said property. This order is subject to acceptance by vendor at home or division office and expresses the entire contract, and no verbal agreements or warranties shall be binding, and the undersigned acknowledges the receipt of a copy hereof.

Amey West Wash Laundry
 Anton Teller.

Witnesses:
 O. E. Wake.

The plaintiff filed the common counts to which defendant
 defendant pleaded the general issue with affidavit of merits and
 notice that on the trial of the case it would rely upon the
 following matters by way of defense:-- That defendant ordered of the
 plaintiff a wood washer manufactured by The American Laundry Machinery
 Co., but the plaintiff, disregarding said order, fraudulently
 delivered to defendant a wood washer of an entirely different and
 inferior make; that as part of said order of said laundry
 machinery the plaintiff, by its duly authorized agent, expressly
 warranted that said machinery so ordered, though second-hand, would
 run as well and do the work for which it was ordered as effectively
 as new machinery, and also agreed that if it did not, plaintiff
 would make it do so, and beendant, relying upon said warranty, did
 not return the same and put it in good running order; that when defendant
 returned the same, the defendant, by its duly authorized agent, agreed to

demanded that plaintiff take it back, but plaintiff by its duly authorized agent, refused so to do, and in lieu thereof promised to put it into good working order at once; that though often requested plaintiff has totally failed to put said machinery in such order and neither the plaintiff nor the defendant has at any time been able to put said laundry machinery or any part thereof into operation, as a result of which it has stood idle in defendant's place of business ever since it was delivered, and has been of no advantage or benefit whatsoever; that as a result of the failure of the plaintiff to make good its said warranty and to put said machinery in running order, defendant has been compelled to employ at all times since said contract of purchase was made, two extra men to do by night the work which defendant had planned to have said machinery do by day, at an extra expense of \$60.00 per week, and defendant avers that had said machinery been of the kind and nature ordered and had it been put in working order as plaintiff agreed, it would have done said work during the day time without additional cost, and defendant would have been saved said extra expense by having it done by night; that defendant has also suffered the loss of \$61.00 on account of freight and demurrage charges on said machinery.

A jury trial was had with a finding for the plaintiff in the sum of \$525.00. Judgment was entered for said sum and defendant prosecuted this appeal.

The contention of the defendant is that this case must stand or fall by reason of the third instruction, given on the part of the plaintiff which is as follows:-

"The court instructs the jury that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagements, it is conclusively presumed that the whole engagements of the parties and the extent and manner of their undertaking was reduced to writing.

And in the case before you, if you believe from all the evidence that the defendant signed the written order known as 'Plaintiff's Exhibit 1', and that said written order contains a complete and legal obligation embodying all the terms of the contract and the undertakings of the plaintiff, then all oral testimony of conversations or declarations, previous to, at the time when it was completed or afterwards,

And in the case before you, if you believe from all the evidence that the defendant signed the written order known as Plaintiff's Exhibit 1, and that said written order contains complete and legal obligation embodying all the terms of the contract and the undertakings of the Plaintiff, then all oral testimony or conversations or declarations, previous to, at the time when it was completed or afterwards, assumed that the whole engagements of the parties and the object or extent of such engagements, it is conclusively to import a legal obligation, without any uncertainty as to deliberately put their engagements into writing, in such terms "The court instructs the jury that when the parties have Plaintiff which is as follows:-

by reason of the third instruction, given on the part of the Plaintiff the defendant is that this case must stand

\$525.00. Judgment was entered for said sum and defendant pro-

jury trial was had with a finding for the Plaintiff in the

and marriage charges on said machinery.

defendant has also suffered the loss of \$61.00 on account of freight

saved said extra expense by having it done by night; that

the day time without additional cost, and defendant would have

making order as Plaintiff agreed, it would have done said work

machinery been of the kind and nature ordered and had it been put in

extra expense of \$60.00 per week, and defendant knew that had said

defendant had planned to have said machinery do by day, at an

contract of purchase was made, two extra men to do by night the work

defendant has been compelled to employ at all times since said

and the said warranty and to put said machinery in running order,

however; that as a result of the failure of the Plaintiff to make

even since it was delivered, and has been of no advantage or benefit

result of which it has stood idle in defendant's place of business

at said laundry machinery or any part thereof into operation, as a

neither the Plaintiff nor the defendant has at any time been able to

Plaintiff has totally failed to put said machinery in such order and

put it into good working order at once; that though often requested

authorized agent, refused so to do, and in lieu thereof promised to

that said Plaintiff take it back, but Plaintiff by its duly

can have no bearing upon the rights of the parties.

And if you believe from all the evidence that the plaintiff has carried out its contract by the delivery of the washer and extractor ordered, then, in that case, the plaintiff is entitled to recover."

It is the contention of the defendant that it was manifestly reversible error to so instruct the jury, because it directed a verdict and withdrew from its consideration defendant's entire defense, namely, that after the contract of purchase was executed, the parties entered into a valid agreement whereby plaintiff was to put the machine in running order if defendant would remove it from the freight house, which agreement it was competent to prove by oral testimony, the contract of purchase not being under seal.

It will be noted that the defendant bought of the plaintiff one used or second-hand 40 x 84" eight pocket Detroit Laundry Machinery Company wood washer, also one American 26" extractor with straight counter shafts and sold "as is." The machinery purchased of the plaintiff by the defendant was of a known type and not specially made for the buyer by the seller.

In view of what is disclosed by the record, the trial court was fully warranted in giving the instruction complained of because the change of modification of the contract according to the testimony of the defendant's witnesses was inconsistent with the terms and legal effect of the instrument relied upon by the plaintiff. The rule is, when parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusive, and that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. *Fuchs & Lang Co. vs Kittredge & Co.* 242 Ill. 88-94.

may have no bearing upon the rights of the parties.

And it is your belief from all the evidence that the plaintiff has carried out its contract by the delivery of the washer and extractor ordered, that in that case, the plaintiff is entitled to recover.

It is the contention of the defendant that it was satisfied

with the contract of purchase was executed, the parties entered into a valid agreement whereby plaintiff was to put the machine in

the house and defendant would remove it from the freight house, and order it delivered to the plaintiff.

It will be noted that the defendant bought of the plaintiff

or second-hand 40 x 84" eight pocket Detroit Laundry Machinery wood washer, also one American 80" extractor with straight shaft and sold "as is." The machinery purchased of the

buyer by the seller.

In view of what is disclosed by the record, the trial court

of modification of the contract according to the testimony

defendant's witnesses was incorrect with the terms and legal effect of the instrument relied upon by the plaintiff. The rule is,

the parties have deliberately put their engagements into writing in terms as import a legal obligation, without any uncertainty as to

the subject or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of

the understanding was reduced to writing; and all oral testimony of a conversation between the parties, or of conversation or declaration

at the time when it was completed, or afterwards, as it would in many instances to substitute a new and different contract for

the one which was really agreed upon, to the prejudice, possibly, of the parties, is rejected. *Woods & Lang Co. vs. Kitzhaber & Co.*

There is no warranty disclosed by the terms of the contract relied upon by the plaintiff. If a buyer gets what he has bargained for, there is no implied warranty thereof though it does not answer his purpose. Peoria Beet Sugar Co. vs Durney, 175 Ill. 631; Tuchs & Lang Co. vs Kittredge & Co., Supra.

A separate parol agreement modifying a written contract as to any matter inconsistent with the terms of legal effect of the written instrument where it appears that the written instrument was intended to be a complete and final statement of the whole transaction between the parties, cannot be interposed as a defense. Platt vs Etha Ins. Co. 153 Ill. 113-121.

In view of the fact that the machinery ordered by the defendant was second-hand property and was sold "as is", and in view of the further fact there was no warranty of the machinery on the part of the plaintiff, we are of the opinion that the court committed no error in giving the instruction complained of and the judgment of the Circuit Court of Kane County should be affirmed, which is accordingly done.

Judgment Affirmed.

There is no warranty disclosed by the terms of the contract

relied upon by the plaintiff. If a buyer gets what he has bargained

for, there is no implied warranty thereof though it does not answer

the purpose. *Booria Beet Sugar Co. vs Turner*, 175 Ill. 631; *Troha &*

Co. vs Kitzberger & Co., 209 Ill.

111. A separate parcel agreement modifying a written contract as to

the matter inconsistent with the terms of legal effect of the written

instrument where it appears that the written instrument was intended

to be a complete and final statement of the whole transaction between

the parties, cannot be interposed as a defense. *First vs State Ins.*

Co. 158 Ill. 113-114.

In view of the fact that the machinery ordered by the

plaintiff was second-hand property and was sold "as is", and in view

of the further fact there was no warranty of the machinery on the

part of the plaintiff, we are of the opinion that the court committed

no error in giving the instruction complained of and the judgment

of the Circuit Court of Kane County should be affirmed, which is

very truly done.

Judgment Affirmed.

STATE OF ILLINOIS, ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. 30th day of
Mar. in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

TO THE OCTOBER TERM A. D. 1925.

Gen. No. 7597.

Agenda 63.

THE AMERICAN LAUNDRY MACHINERY
COMPANY, a foreign corporation,

Defendant-in-error,

vs

AURORA WET WASH LAUNDRY COMPANY,
an Illinois corporation,

Plaintiff-in-error.

Jett, J.

WRIT OF ERROR FROM THE
CIRCUIT COURT OF KANE
COUNTY.

241 I.A 631

This is a suit in assumpsit brought by the American Laundry Machinery Company, a foreign corporation, defendant-in-error, herein-after referred to as the plaintiff, to recover, from the Aurora Wet Wash Laundry Company of Aurora Illinois, plaintiff-in-error, herein-after referred to as the defendant, the purchase price of a washing machine and an extractor which it is claimed the defendant was obligated to pay to the plaintiff by virtue of the sale and delivery to it of the washing machine and extractor in pursuance of the following order:

"WRT 10-19-

M 9-20

The American Laundry Machinery Co.
208 West Monroe Street, Chicago, Ill.

Order No. 43

Sept. 16, 1922.

Please ship the following at prices and conditions
named below:

Ship to Aurora Wet Wash Ldy. Co.
Aurora, Illinois.

How Ship--

When --

Terms \$175.00 with Order \$... B.L. Attached

Balance in equal monthly rates of \$52.50 at 6% covered by
Insurance and Mortgage.

These goods are sold F.O.B. cars at

Kalamazoo, Mich.

Cash Discounts apply on Net amount of Contract.

Where electric equipment is used, fill in Current
and Voltage:

.....Volts, D.C.A.C. CyclePhase.

1-40x84" eight pocket Detroit Ldy. Mchy. Co.

wood washer, with four cylinder doors horizontal

partition, with 2 tub doors, double glazed Elev

header hand wheel attached equipped with Huebsch

2" Auto water valve attached 4" outlet\$450.00

TO THE OCTOBER TERM A. D. 1928.

Agenda 83.

AMERICAN LAUNDRY MACHINERY
COMPANY, a foreign corporation,

Defendant-in-error,

vs.

AMERICAN LAUNDRY MACHINERY
COMPANY, a foreign corporation,

Plaintiff-in-error.

This is a writ in assumpsit brought by the American Laundry
Company, a foreign corporation, defendant-in-error, herein-
after referred to as the plaintiff, to recover from the American Laundry
Company of Aurora, Illinois, herein-
after referred to as the defendant, the sum of \$100.00, and an
extractor which is claimed the defendant was obli-
gated to deliver to the plaintiff under the following

"Writ 10-10-

9-20

The American Laundry Machinery Co.,
308 West Monroe Street, Chicago, Ill.

Sept. 16, 1928.

Order No. 43

Please ship the following at prices and conditions

and below:

Ship to Aurora, Ill.

Aurora, Illinois.

When --

Attached \$100.00 with Order \$100.00

in equal monthly rates of \$8.30 at 6% covered by

first mortgage.

These goods are sold F.O.B. cars at

Kalamazoo, Mich.

Factors apply on Net amount of Contract.

Where electric equipment is used, fill in current

and Voltage:

Light pocket Detroit Lbr. Co.

with four cylinder doors horizontal

position, with 2 tub doors, double glassed Elev

hand wheel attached equipped with Hubsch

2-hand and sold as is ---

1-American 26" Extractors with Straight countershaft

2" hand and Sold as is \$350.00
\$700.00

C. E. Fiske

Conditions to Which the Purchaser Agrees:

The above goods shall remain the property of The American Laundry Machinery Company, and title thereto shall not vest in vendee until entire purchase price and notes are paid; shall remain personal property and not become part of a ny real estate however attached, and shall be at all times fully insured by vendee, insurance payable to vendor as its interest may appear. Destruction of goods by fire shall not release payments, except to the extent of insurance money actually paid to vendor. Any machinery taken in exchange to be crated and delivered to vendor at depot by vendee. All unpaid installments of purchase price and notes shall at vendor's option, become forthwith due on default for payment of any one of them. Vendor is not liable for delay or failure of delivery caused by strikes or other causes beyond its control. The purchaser to pay all taxes levied on account of said property. This order is subject to acceptance by vendor at home or division office and expresses the entire contract, and no verbal agreements or warranties shall be binding, and the undersigned acknowledges the receipt of a copy hereof.

Aurora Wet Wash Laundry
Anton Fajfar.

Witnesses:

C. B. Fiske."

The plaintiff filed the common counts to which declaration the defendant pleaded the general issue with affidavit of merits and gave notice that on the trial of the case it would rely upon the following matters by way of defense:- That defendant ordered of the plaintiff a wood washer manufactured by The American Laundry Machinery Company, but the plaintiff, disregarding said order, fraudently delivered to defendant a wood washer of an entirely different and greatly inferior make; that as part of said order of said laundry machinery the plaintiff, by its duly authorized agent, expressly warranted that said machinery so ordered, though second-hand, would run as well and do the work for which it was ordered as effectively as new machinery, and also agreed that if it did not, plaintiff would make it do so, and defendant, relying upon said warranty, ordered said laundry machinery; that as part of the contract of purchase of said machinery the defendant, by its duly authorized agent, agreed to install the same and put it in good running order; that when defendant discovered that said

Hand and sold as in
American 28' Extensometer with straight counterbalance
Hand and sold as in

to which the Purchaser Agrees:
The above goods shall remain the property of the American
Laundry Machinery Company, and title thereto shall not vest in
the Purchaser until entire purchase price and notes are paid; shall
remain personal property and not become part of a real estate
interest, and shall be at all times fully insured by
the Purchaser payable to vendor as its interest may appear.
The extent of insurance money actually paid to vendor
for the extent of insurance money actually paid to vendor
shall be taken in exchange to be stated and delivered to
vendor at deposit of vendee. All unpaid installments of purchase
price and notes shall at vendor's option, become forthwith due
in default for payment of any one of them. Vendor is not liable
for delay or failure of delivery caused by strikes or other causes
beyond its control. The purchaser to pay all taxes levied on
the property. This order is subject to assignment by
the purchaser or division office and express the entire con-
tract and no verbal agreements or variations shall be binding.
The undersigned acknowledges the receipt of a copy hereof.

Ameyor Wet Wash Laundry
Ameyor Washery

General issue with all parts of machine and
the trial of the case it would rely upon the
by way of defense:- That defendant ordered of the
Machinery
Laundry Machinery Company, defendant manufactured by The American Laundry Company,
disregarding said order, fraudulently delivered to
rather of an entirely different and greatly inferior

the daily mentioned agent, expressly warranted that said
though hand, could run as well and do the
said laundry machinery; that
the defendant

machinery was not of the kind or make ordered, it demanded that plaintiff take it back, but plaintiff by its duly authorized agent, refused so to do, and in lieu thereof promised to put it into good working order at once; that though often requested, plaintiff has totally failed to put said machinery in such order and neither the plaintiff nor the defendant has at any time been able to put said laundry machinery or any part thereof into operation, as a result of which it has stood idle in defendant's place of business ever since it was delivered, and has been of no advantage or benefit whatsoever; that as a result of the failure of the plaintiff to make good its said warranty and to put said machinery in running order, defendant has been compelled to employ at all times since said contract of purchase was made, two extra men to do by night the work which defendant had planned to have said machinery do by day, at an extra expense of \$60.00 per week, and defendant avers that had said machinery been of the kind and nature ordered and had it been put in working order as plaintiff agreed, it would have done said work during the day time without additional cost, and defendant would have been saved said extra expense by having it done by night; that defendant has also suffered the loss of \$61.00 on account of freight and demurrage charges on said machinery.

A jury trial was had with a finding for the plaintiff in the sum of \$525.00. Judgment was entered for said sum and defendant prosecuted this appeal.

The contention of the defendant is that this case must stand or fall by reason of the third instruction, given on the part of the plaintiff which is as follows:-

"The court instructs the jury that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagements, it is conclusively presumed that the whole engagements of the parties and the extent and manner of their undertaking was reduced to writing.

And in the case before you, if you believe from all the evidence that the defendant signed the written order known as 'Plaintiff's Exhibit 1', and that said written order contains

a complete and legal obligation embodying all the terms of the contract and the undertakings of the plaintiff, then all oral testimony of conversations or declarations, previous to, at the time when it was completed or afterwards, can have no bearing upon the rights of the parties.

And if you believe from all the evidence that the plaintiff has carried out its contract by the delivery of the washer and extractor ordered, then, in that case, the plaintiff is entitled to recover."

It is the contention of the defendant that it was manifestly reversible error to so instruct the jury, because it directed a verdict and withdrew from its consideration defendant's entire defense, namely, that after the contract of purchase was executed, the parties entered into a valid agreement whereby plaintiff was to put the machine in running order if defendant would remove it from the freight house, which agreement if was competent to prove by oral testimony, the contract of purchase not being under seal.

It will be noted that the defendant bought of the plaintiff one used or second-hand 40 x 84" eight pocket Detroit Laundry Machinery Company wood washer, also one American 26" extractor with straight counter shafts and sold "as is." The machinery purchased of the plaintiff by the defendant was of a known type and not specially made for the buyer by the seller.

In view of what is disclosed by the record, the trial court was fully warranted in giving the instruction complained of because the change or modification of the contract according to the testimony of the defendant's witnesses was inconsistent with the terms and legal effect of the instrument relied upon by the plaintiff. The rule is, when parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declara-

tions at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. Fuchs & Lang Co. vs Kittredge & Co., 242 Ill. 88-94.

There is no warranty disclosed by the terms of the contract relied upon by the plaintiff. If a buyer gets what he has bargained for, there is no implied warranty thereof though it does not answer his purpose. Peoria Beet Sugar Co. vs Turney, 175 Ill. 631; Fuchs & Lang Co. vs Kittredge & Co., supra.

A separate parol agreement modifying a written contract as to any matter inconsistent with the terms of legal effect of the written instrument where it appears that the written instrument was intended to be a complete and final statement of the whole transaction between the parties, cannot be interposed as a defense, Platt vs Etna Ins. Co., 153 Ill. 113-121.

In view of the fact that the machinery ordered by the defendant was second-hand property and was sold "as is", and in view of the further fact there was no warranty of the machinery on the part of the plaintiff, we are of the opinion that the court committed no error in giving the instruction complained of and the judgment of the Circuit Court of Kane county should be affirmed, which is accordingly done.

Judgment affirmed.

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many instances to substitute a new and different contract for
the parties, is rejected. *Trona & Lang Co. vs Kittredge & Co.*

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a specific parcel of goods, but a contract for the sale of goods
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goods, but a contract for the sale of goods of a certain kind and
quality. *Trona & Lang Co. vs Kittredge & Co.*

Judgment affirmed.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 632

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 29 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term, 1925.

William J. Baker,
Appellee,

vs.

Appeal from the Circuit
Court of Henry County.

State Bank of Annawan,
Appellant.

241 I.A. 632

Partlow, J.

Appellee, William J. Baker, and Nellie J. Baker, his wife, began suit in the circuit court of Henry county against appellant State Bank of Annawan, to recover money alleged to be due. The suit was dismissed as to the wife. There was a verdict and judgment against appellant for \$19,946, and an appeal has been prosecuted to this court.

The declaration consisted of the common counts, and one special count which charged that on March 17, 1921, appellee and wife loaned to appellant, \$17,000, and appellant promised to repay on demand, together with interest at four per cent per annum; that if no demand or payment was made before March 17, 1922, appellant would pay interest at six per cent per annum; that on July 1, 1921, appellee demanded payment with interest at four per cent. Attached to the declaration was an affidavit of appellee that he was authorized to make the affidavit on behalf of himself and his wife; that the nature of the demand was for money loaned to appellant at its request, together with interest thereon. Appellant filed the general issue together with notice of special defenses, and an affidavit of merits in which it charged that appellee and his wife were not the joint owners of the \$17,000, but that each was the separate and individual owner of a distinct portion of said sum, and that each took the promissory note of W. H. Holzinger, secured by the personal endorsement of Daniel J. Holzinger and Mell Van Hyfte, as surety, for their portion of said sum; that the appellant did not

October Term, 1925.

Appeal from the Circuit
Court of Henry County.

William J. Baker,
Appellee,

vs.

State Bank of Annawan,
Appellant.

241 I.A. 632

Follow, J.

Appellee, William J. Baker, and Nellie J. Baker, his wife, brought suit in the circuit court of Henry county against appellant State Bank of Annawan, to recover money alleged to be due. The suit was dismissed as to the wife. There was a verdict and judgment against appellant for \$12,346, and an appeal has been prosecuted to this court.

The declaration consisted of the common counts, and one special count which charged that on March 17, 1921, appellee and appellant loaned to appellant \$17,000, and appellant promised to repay the same, together with interest at four per cent per annum; that if no demand or payment was made before March 17, 1922, appellant would pay interest at six per cent per annum; that on July 1, 1922, appellee demanded payment with interest at four per cent. Attached to the declaration was an affidavit of appellee that he was authorized to make the affidavit on behalf of himself and his wife; that the nature of the demand was for money loaned to appellant at its request, together with interest thereon. Appellant filed the general issue together with notice of special defenses, and an affidavit of merits in which it charged that appellee and his wife were not the joint owners of the \$17,000, but that each was the separate and individual owner of a distinct portion of said sum, and each took the promissory note of W. H. Holzinger, secured by the mortgage and endorsement of Daniel J. Holzinger and Nell Van Wyke, as their portion of said sum; that the appellant did not

borrow any money of appellee and his wife, and did not promise to pay the amount demanded, or any part thereof.

The evidence shows that prior to January 1921, the Bank of Annawan was a private bank owned by William H. Holzinger, and Daniel J. Holzinger, a brother of William, was the cashier. In January, 1921, it was incorporated as a state bank under the name of the State Bank of Annawan, Daniel J. Holzinger continued as its cashier, William H. Holzinger was its vice-president, and both of them were directors. Appellee was a farmer who had been a customer of the bank when it was a private bank and he continued as such after it was incorporated as a state bank. About one and one half years prior to the transaction in question, appellee purchased a farm in Minnesota and borrowed from his wife, \$5000, for which he gave her his note. This money was used in part payment on the Minnesota farm, but the title to the farm was taken in the name of appellee. During the winter of 1920 and 1921, appellee sold this farm and was to receive \$17,000 on March 1, 1921. About March 10, 1921, appellee claims he had a conversation with the cashier of the bank with reference to letting the bank have the money. There is a conflict in the evidence on this point, but it is claimed by appellee that the cashier told him that if he would let the bank have the money the bank would pay him six per cent provided he left it for one year. Appellee testified he told the cashier he did not care to leave the money in the bank for a year; that he might purchase a farm and wanted the money at such time. The cashier told him if he would put the money in the bank, the bank would get some of its directors to sign a note as security.

On March 15, 1921, appellee received the money in two drafts payable to his order. He deposited the drafts in his name. He testified he had a conversation with the cashier in which the cashier told him he would have a note signed by some of the directors. A note was signed by Nell Van Hyfte, who at that time was a director of the bank. This note was left at the bank and appellee went to his home where he had a conversation with his wife relative to the

throw any money of appellee and his wife, and did not promise to pay the amount demanded, or any part thereof.

The evidence shows that prior to January 1921, the Bank of Annawan was a private bank owned by William H. Holzinger, and Daniel J. Holzinger, a brother of William, was the cashier. In January, 1921, it was incorporated as a state bank under the name of the State Bank of Annawan, Daniel J. Holzinger continued as its cashier, William H. Holzinger was its vice president, and both of them were directors. Appellee was a farmer who had been a customer of the bank when it was a private bank and he continued as such after it was incorporated as a state bank. About one and one half years prior to the transaction in question, appellee purchased a farm in Minnesota and borrowed from his wife, \$5000, for which he gave her a note. This money was used in part payment on the Minnesota farm, and the title to the farm was taken in the name of appellee. During the winter of 1920 and 1921, appellee sold this farm and was to receive \$17,000 on March 1, 1921. About March 10, 1921, appellee claims to have had a conversation with the cashier of the bank with reference to letting the bank have the money. There is a conflict in the evidence on this point, but it is claimed by appellee that the cashier told him that if he would let the bank have the money the bank would pay him six per cent provided he left it for one year. Appellee testified as told the cashier he did not care to leave the money in the bank for a year; that he might purchase a farm and wanted the money at that time. The cashier told him if he would put the money in the bank, he would let him have the money in two drafts.

On March 15, 1921, appellee received the money in two drafts payable to his order. He deposited the drafts in his name. He testified he had a conversation with the cashier in which the cashier told him he would have a note signed by some of the directors that was signed by Nell Van Hyfte, who at that time was a director of the bank. This note was left at the bank and appellee went to the bank where he had a conversation with his wife relative to the

matter. The wife then had a conversation over the telephone with the cashier. Just what this conversation was does not appear, but the evidence shows that after this conversation, the cashier destroyed the \$17,000 note signed by Van Hyfte, and made out two notes, one for \$11,725, payable to appellee, and one for \$5,275, payable to the wife, which notes were signed by Daniel J. Holzinger, W.B. Holzinger and Mell Van Hyfte, in the order named. The next day the cashier told appellee he had the two notes, and they had been signed by some of the directors. Appellee drew his personal check for \$17,000, payable to the appellant, and gave the check to the cashier. The two notes were delivered to appellee and he testified that after he looked them over he asked the cashier if he would put the amount of the check to appellee and his wife's credit on the books of the bank, and the cashier replied that he would, but this was never done. In September 1921, appellee told the cashier he was about to buy a farm and wanted his money in thirty days. The cashier replied that money was tight, and the bank would have to have sixty days. Appellee told the cashier to get it as soon as he could. In October, 1921, the bank was temporarily closed by the State Auditor, but was afterwards reopened. After the bank was closed, appellee made a demand for his money. He did not get it, and he went to William H. Holzinger and demanded additional security, and Holzinger stated that he would get his brother Harvey to give a second mortgage to William H. Holzinger on his farm in Iowa, and that he would assign the mortgage to Mrs. Baker. Holzinger obtained the mortgage for \$5,500, and assigned it to Mrs. Baker. This was a second mortgage subject to a prior lien of \$10,000.

At the time the suit was commenced, appellee and his wife were plaintiffs, and the evidence was all heard under those pleadings. At the close of the evidence a question arose as to who was the proper parties plaintiff. The court held that the suit could not be maintained in the joint name of appellee and his wife; that it could be

maintained in the name of appellee alone, whereupon the suit was dismissed as to Mrs. Baker, the declaration was amended so as to make the action by appellee alone, and judgment was rendered accordingly.

Appellant contends that the loan was made to W. H. Holzinger and not to appellant. Appellee testified to several conversations he had with the cashier before the loan was made which conversations show that the loan was made to appellant. There are facts and circumstances in evidence which corroborate appellee in this respect. On the other hand the cashier denies the substance of all of these conversations. His evidence is that the loan was made to W. H. Holzinger and in this he is corroborated to a certain extent. Evidence was offered by appellee that the general reputation of the cashier and W. H. Holzinger for truth and veracity was bad. Evidence was offered to sustain the good reputation of the cashier for truth and veracity, but no evidence was offered to sustain the general reputation of W. H. Holzinger. Under this condition of the proof, it was a question of fact for the jury to say to whom the loan was made. If the jury believed the evidence offered by appellee and did not believe the evidence offered by appellant they were justified in finding that the loan was made to appellant. The verdict in this respect was not against the weight of the evidence and we are not justified in reversing the judgment on that ground.

It is also insisted by appellant that the evidence does not show that appellee was the owner of the entire amount for which the suit was brought, hence the judgment in his favor for the whole amount is erroneous. In order for appellee to be entitled to a judgment for the whole amount it was necessary for him to prove that he had the legal title to the whole amount. The fact that his wife might have had an equitable interest in some of it did not bar his right to recover all of it provided he had the legal title to all of it. Chadsey vs. Lewis, 6 Ill. 153; Ridgely Nat. Bank vs. Patton,

maintained in the name of appellee alone, whereupon the suit was dismissed as to Mrs. Baker, the declaration was amended so as to make the action by appellee alone, and judgment was rendered accordingly.

Appellant contends that the loan was made to W. H. Holzinger and not to appellee. Appellee testified to several conversations held with the cashier before the loan was made which conversations show that the loan was made to appellee. There are facts and circumstances in evidence which corroborate appellee in this respect. On the other hand the cashier denies the substance of all of these conversations. His evidence is that the loan was made to W. H. Holzinger and in this he is corroborated to a certain extent. Evidence was offered by appellee that the general reputation of the cashier and W. H. Holzinger for truth and veracity was bad. Evidence was offered to sustain the good reputation of the cashier for truth and veracity, but no evidence was offered to sustain the general reputation of W. H. Holzinger. Under this condition of the proof, it was a question of fact for the jury to say to whom the loan was made. If the jury believed the evidence offered by appellee they did not believe the evidence offered by appellant they were justified in finding that the loan was made to appellee. The verdict in this respect was not against the weight of the evidence and we are not justified in reversing the judgment on that ground. It is also insisted by appellant that the evidence does not show that appellee was the owner of the entire amount for which the suit was brought, hence the judgment in his favor for the whole amount is erroneous. In order for appellee to be entitled to a judgment for the whole amount it was necessary for him to prove that he had the legal title to the whole amount. The fact that his wife might have had an equitable interest in some of it did not bar his right to recover all of it provided he had the legal title to all of it. *Chasey vs. Lewis*, 6 Ill. 183; *Higley Nat. Bank vs. Patton*.

109 Ill. 479; Tarrant vs. Burch, 102 Ill. App. 393; Reed vs. New York Bank, 135 Ill. App. 170; 30 Cyc. 23. His right was not lost or changed by the fact that appellee may have erroneously commenced his suit in the name of himself and his wife, and in his affidavit of merits attached to the declaration and in his evidence he swore that the amount due belonged to them jointly. He later testified to the facts on which his conclusion as to ownership were based. If the facts testified to by him showed that he had the legal title to the entire amount, and such facts constituted a preponderance of the evidence, then he had a right to recover notwithstanding his prior testimony that the money was the joint property of himself and his wife. 22 R. C. L. 78.

It appears from the evidence that when appellee bought the Minnesota farm, he borrowed \$5000 from his wife and gave her his note therefor. This vested the legal title to the \$5000 in him. The title to the farm was taken in his name. When it was sold the drafts were payable to him and were deposited by him in his own name in the bank. He owed his wife \$5000 and probably intended to pay her, but he did not do so, therefore he still had the legal title to the whole amount when negotiations were begun with the cashier to loan the money. When these negotiations were completed and the two notes were delivered to him, he drew his personal check for the whole amount, payable to appellant, and delivered it to the cashier. Both notes were delivered to him and there is no evidence that either was ever delivered to the wife. He had both of them in his possession on the trial and offered them in evidence. At the time the check was delivered to the cashier appellee testified that he told the cashier to place the amount of the check to the account of appellee and his wife. If this had been done there might be more force in the contention of appellant that this constituted a division of the fund and that the legal title to a part of it vested in the wife. This request of appellee was not complied with. The amount of the check was not

Ill. 479; Tarrant vs. Burroughs, 102 Ill. App. 323; Reed vs. New

York Bank, 135 Ill. App. 170; 30 Cyc. 33. His right was not lost

changed by the fact that appellee may have erroneously commenced

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Both parties

to appellant, and delivered it to the cashier. Both parties

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the amount of the loan.

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placed to the credit of appellee and his wife. Neither of them received any credit for it or any part of it. There is no evidence that the note of \$5000 to appellee's wife was ever paid, cancelled, or surrendered, or that the debt was ever extinguished. This suit is not upon the two notes payable to appellee and his wife. It is for the recovery of the \$17000 paid to the cashier of appellant by appellee. At the time this money was delivered to the cashier, the legal title to all of it was in appellee. If the jury believed the evidence of appellee, then the conditions upon which it was paid to appellant were never complied with. The contract was never completed and for that reason, the legal title to the whole fund remained in appellee. The mere fact that the wife may have had an equitable interest in a part of the money did not defeat appellee's right of action if he had the legal title to all of it. Under the evidence we think the court and jury were justified in finding that the legal title to the whole amount was in appellee and that appellee had a right to maintain an action therefor.

It is next insisted by appellant that if appellee was entitled to recover at all, it must have been upon an express contract; that there was no evidence of an implied contract; that the court announced that the recovery, if there was to be one, must be upon an express contract, but notwithstanding this announcement, instructions were given relative to an implied contract.

The declaration set up an express contract and also included the common counts. Appellant in its notice of special defenses under the general issue and in its affidavit of merits denied that there was an express contract. Appellee's right to recover, under the law, was not confined to an express contract. He might recover upon implied assumpsit based upon any grounds which he might be able to establish, and any evidence which would be competent to establish his cause of action, in the absence of an express contract, would be competent. *People vs. Darrow*, 172 Ill. 62; *Mecartney vs. Wallace* 214 Ill. App. 618; *Humphreys vs. Orrey*, 220 Ill. App. 523. A

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It is next insisted by appellant that if appellee was entitled to recover at all, it must have been upon an express contract; that there was no evidence of an implied contract; that the court announced that the recovery, if there was to be one, must be upon an express contract, but notwithstanding this announcement, the court's actions were given relative to an implied contract.

The declaration set up an express contract and also included the common counts. Appellant in its notice of special defenses under the contract pleaded that there was no express contract, under the law, it might recover upon an implied contract. Appellee's right to recover, under the law, would be maintained in the absence of an express contract, would be maintained. People vs. Parrow, 172 Ill. 62; McCarty vs. Wallace, 113 Ill. App. 618; Humphreys vs. Orrey, 220 Ill. App. 622.

contract is implied where money has been obtained by fraud, deceit or fraudulent practices. Arnold vs. Dodson, 272 Ill. 377. Implied assumpsit will lie where money is received with no intent to repay and to cheat the owner out of it. Booker vs. Wolf, 195 Ill. 365. An action for money had and received lies against one who receives money which is to be applied to a particular purpose and the person receiving it fails to apply it to the agreed purpose but pays it to another who had no right to it. Drovers National Bank vs. O'Hare, 119 Ill. 646; Gray vs. Callender, 181 Ill. 173. If there was an express contract which had been violated and the only duty remaining was to pay the amount due, there could be recovery for money had and received. Jones vs. Marks, 40 Ill. 313; Larminie vs. Carley, 114 Ill. 196. Assumpsit for money had and received may be maintained where one person has obtained money belonging to another which in equity and good conscience he has no right to retain. In such a case the law implies a promise to repay. Esplin vs. Howe, 112 Ill. 283; National Bank vs. Gatton, 172 Ill. 625; Richardson vs. Moloney, 195 Ill. 575. In the following cases a recovery was permitted where the declaration was on an express contract and the common counts, and where proof was made of an express contract. Leigh vs. American Brake Beam Co., 205 Ill. 147; Evans vs. Howell, 211 Ill. 85; Chicago vs. Duffy, 218 Ill. 242.

Appellee evidently thought he had an express contract and so declared in his declaration. Out of an abundance of caution he added the common counts. His evidence showed an express contract, but this was denied by appellant. It would indeed be a peculiar condition of affairs if he thought he had an express contract, and the evidence failed to establish such a contract, that he could not recover at all, after appellant had obtained his money and refused to pay it back. It is undisputed that the check for \$17,000 was payable to appellant. It was delivered to the cashier and across its face appears the following: "State Bank of Annawan, Paid, March 17, 1921, per Annawan, Ill." Appellant admits that it did not pay this check to the payee therein named. If the preponderance of the

contract is implied where money has been obtained by fraud, deceit or
fraudulent practices. Arnold vs. Dobson, 272 Ill. 377. Implied
contract will be found in many cases. See, for example, Wolf vs. Booker, 192 Ill. 366. An
action for money had and received lies against one who receives
money which is to be applied to a particular purpose and the person
to whom it is so applied has no right to it. Provera National Bank vs. O'Brien,
111 Ill. 646; Gray vs. Callender, 181 Ill. 175. If there was an
express contract which had been violated and the only duty remaining
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111 Ill. 196. Assumpsit for money had and received may be maintained
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situation of affairs if he thought he had an express contract, and
his evidence failed to establish such a contract, that he could not
recover at all, after appellant had obtained his money and refused
to pay it back. It is understood that the check for \$14000 was
payable to appellant. It was delivered to the cashier and across
the face appears the following: "State Bank of Annawan, Paid, March
1, 1911, per Annawan, Ill." Appellant admits that it did not pay
the check to the payee therein named. If the preponderance of the

evidence showed that appellant received the check and did not pay the money to the person designated by appellee, then appellant owes appellee the amount of the original deposit. A bank cannot charge its depositor with any payment, except such as is made in conformity with the order of the depositor. Gray vs. Collender, Supra; Dovers Bank vs. O'Hare, Supra; Deland vs. Dixon Bank, Ill, Ill, 325; 3 P. C. L. p 541. Under the authorities cited, there was evidence tending to establish several grounds upon which there might be a recovery under an implied contract. Appellee had a right to submit all of these facts to a jury under instructions applicable to an implied contract and the ruling of the court was not erroneous in this respect.

Appellant offered evidence to prove how the \$17000 was credited on the books of the bank. It first offered Exhibit 4 which was a deposit slip made by the cashier showing that all of the money was deposited in his name. Exhibit 5 consisted of certain portions of ledger sheets of the bank showing the account of the cashier and that the deposit was in his name. Exhibit 6 was a deposit slip showing that on April 8, 1921, William H. Holzinger deposited a check for \$5275. Objections were sustained to each of these offers and appellant insists that this was error for the reason that this evidence tended to refute any right of recovery under an implied contract and tended to show that the loan was to W. H. Holzinger and not to appellant. It is claimed by appellant that the entire amount of the check of appellee was credited to the account of the cashier and that about half of the money was used to pay a debt of W. H. Holzinger to appellant, and that the other half was retained by the cashier under some arrangements with his brother.

Exhibits 4 and 6 were properly excluded because the abstract of the evidence does not show that any foundation was laid for their admission and that was one of the grounds of objection by appellee, A general offer was made to prove the verity and correctness of Exhibit 5, but no attempt was made to comply with the offer. We

evidence showed that appellant received the check and did not pay money to the person designated by appellee, then appellant owes appellee the amount of the original deposit. A bank cannot charge the depositor with any payment, except such as is made in conformity with the order of the depositor. Gray vs. Gollinger, Supra; Dovers vs. O'Hare, Supra; Deland vs. Dixon Bank, Ill, Ill, 328; S. R. O. Under the authorities cited, there was evidence tending to establish several grounds upon which there might be a recovery under appellee's contract. Appellee had a right to admit all of these facts to a jury under instructions applicable to an implied contract. The ruling of the court was not erroneous in this respect.

Appellant offered evidence to prove how the \$17000 was credited on the books of the bank. It first offered Exhibit A which was a deposit slip made by the cashier showing that all of the money was deposited in his name. Exhibit B consisted of certain portions of ledger sheets of the bank showing the account of the cashier and that the deposit was in his name. Exhibit C was a deposit slip dated on April 8, 1931, William H. Holzinger deposited a check of \$175.00. Of sections were sustained to each of these offers and appellant insists that this was error for the reason that this evidence tended to prove that the loan was to H. Holzinger and not to appellant. It is claimed by appellant that the entire amount of the check of appellee was credited to the account of the cashier and that about half of the money was used to pay a debt of W. H. Holzinger to appellant, and that the other half was retained by the cashier under some arrangements with his brother. Exhibits A and B were properly excluded because the substance of the evidence was that the loan was to H. Holzinger and not to appellant. It is claimed by appellant that the entire amount of the check of appellee was credited to the account of the cashier and that about half of the money was used to pay a debt of W. H. Holzinger to appellant, and that the other half was retained by the cashier under some arrangements with his brother. Exhibits A and B were properly excluded because the substance of the evidence was that the loan was to H. Holzinger and not to appellant.

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are asked to assume that such evidence would have established facts sufficient to admit the exhibit in evidence. We do not think the offer was sufficient. It also appears that all of these exhibits were made by the agents of appellant and that appellee had no knowledge of any of them, they were not binding on appellee and were properly excluded.

The by-laws of appellant provided that "no money shall be borrowed on behalf of or for the use of the bank without authority of the board of directors." There was no authority from the board of directors to make this loan. Appellee owned one share of stock in the bank. Appellant insists that appellee as a stockholder was charged with notice of this by-law, hence he cannot recover. It is not contended that appellee had any actual notice of this by-law.

In *T Thompson on Corporations*, Second Edition, page 1273, it is said: "But when a stockholder deals with a corporation as a customer he is not chargeable with constructive notice of a resolution adopted by the board of directors, or with the provisions of its by-laws regulating the mode in which business shall be transacted with its customers that are not brought to his knowledge." To the same effect are *IV Cook on Corporations* (8th Ed.) 622; 14 *Corpus Juris* 348; 7 *R. C. L.* 306. If the money was loaned to the bank and received by its officers, the bank is estopped from claiming that it had no authority to make the loan. *Bradley vs. Ballard*, 55 Ill. 413; *Darst vs. Gale*, 83 Ill. 136; *Kadish vs. Gardner City Assn.*, 161 Ill. 531; *U. S. Brewing Co. vs. Dolese*, 259 Ill. 274.

At the close of the evidence on behalf of appellee, a motion was made to direct a verdict in favor of appellant. The court held that the suit could not be maintained by appellee and his wife. There was a dismissal as to the wife and appellee was granted leave to amend the declaration. Appellant then moved to continue the case to the next term of court and filed an affidavit in support of its motion. The motion was overruled and this ruling is assigned as error. The only amendments to the declaration were such as were made

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necessary by the dismissal as to the wife. No new issues were presented. The affidavit for a continuance alleged that it would require several days time in which to investigate the law and prepare the pleadings and a much longer time to close the issue presented by the amended declaration. The court continued the hearing from July 9 to July 13 when the trial proceeded and appellant presented its evidence in defense. We do not think there was any abuse of the discretion of the court in this matter and that appellant was not injured by the refusal of the court to continue the case for the term.

During the trial the court announced that the jury would be instructed that they must determine the liability of appellant from the conversations between the parties. It is insisted that appellee acquiesced in this announcement and thereby estopped himself from recovering on the common counts for money had and received, or upon an implied contract; that the court later shifted its position on this question and gave to the jury instructions with reference to an implied contract; that the case was tried upon one theory and the jury was instructed upon another theory; that practically all of the instructions given on behalf of appellee were erroneous and those refused on behalf of appellant should have been given, and each instruction is argued separately.

It will be impossible to consider these instructions in detail. As we understand the complaints of appellant, they are that the instructions authorized a recovery on either an express contract or an implied contract; that some of them refer to the \$17000 as a deposit; that others authorize a verdict upon an implied contract if the jury believed appellant received money from appellee under such circumstances as in equity and good conscience appellant should repay the same; that some of them assume that appellee was the owner of the money and ignore what appellant contends was a disputed question of fact as to the ownership of a part of the fund by the wife.

We do not think any of these contentions are justified. What we have already said with reference to the right to recover under an implied contract is applicable to the claim of appellant that the

necessary by the witness as to the wife. No new issues were presented. The affidavit for a continuance alleged that it would require several days time in which to investigate the law and prepare the pleadings and a much longer time to close the issue presented by the amended declaration. The court continued the hearing from July 9 to July 13 when the trial proceeded and appellant presented its evidence in defense. We do not think there was any abuse of the discretion of the court in this matter and that appellant was not misled by the refusal of the court to continue the case for the term. During the trial the court announced that the jury would be instructed that they must determine the liability of appellant from the conversations between the parties. It is insisted that appellee acquiesced in this announcement and thereby estopped himself from recovering on the common counts for money had and received, or upon an implied contract; that the court later shifted its position on this question and gave to the jury instructions with reference to an implied contract; that the case was tried upon one theory and the jury was instructed upon another theory; that practically all of the instructions were erroneous and should have been given, and each instruction is argued separately.

It will be impossible to consider these instructions in detail. As we understand the complaints of appellant, they are that the instructions authorized a recovery on either an express contract or an implied contract; that some of them refer to the \$17,000 as a debt; that others authorize a verdict upon an implied contract; that some of them assume that appellee was the owner of the money and ignore what appellant contends was a disputed question of fact as to the ownership of a part of the fund by the wife. We do not think any of these contentions are justified.

jury was erroneously instructed on the theory of an implied contract. The rulings on instructions were in accord with the views we have expressed in this opinion. The court did not try the case upon one theory and instruct the jury on another theory. The instructions fairly announced the law applicable to the facts.

We find no reversible error and the judgment will be affirmed.

Judgment Affirmed.

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Judgment Affirmed.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
Mar in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

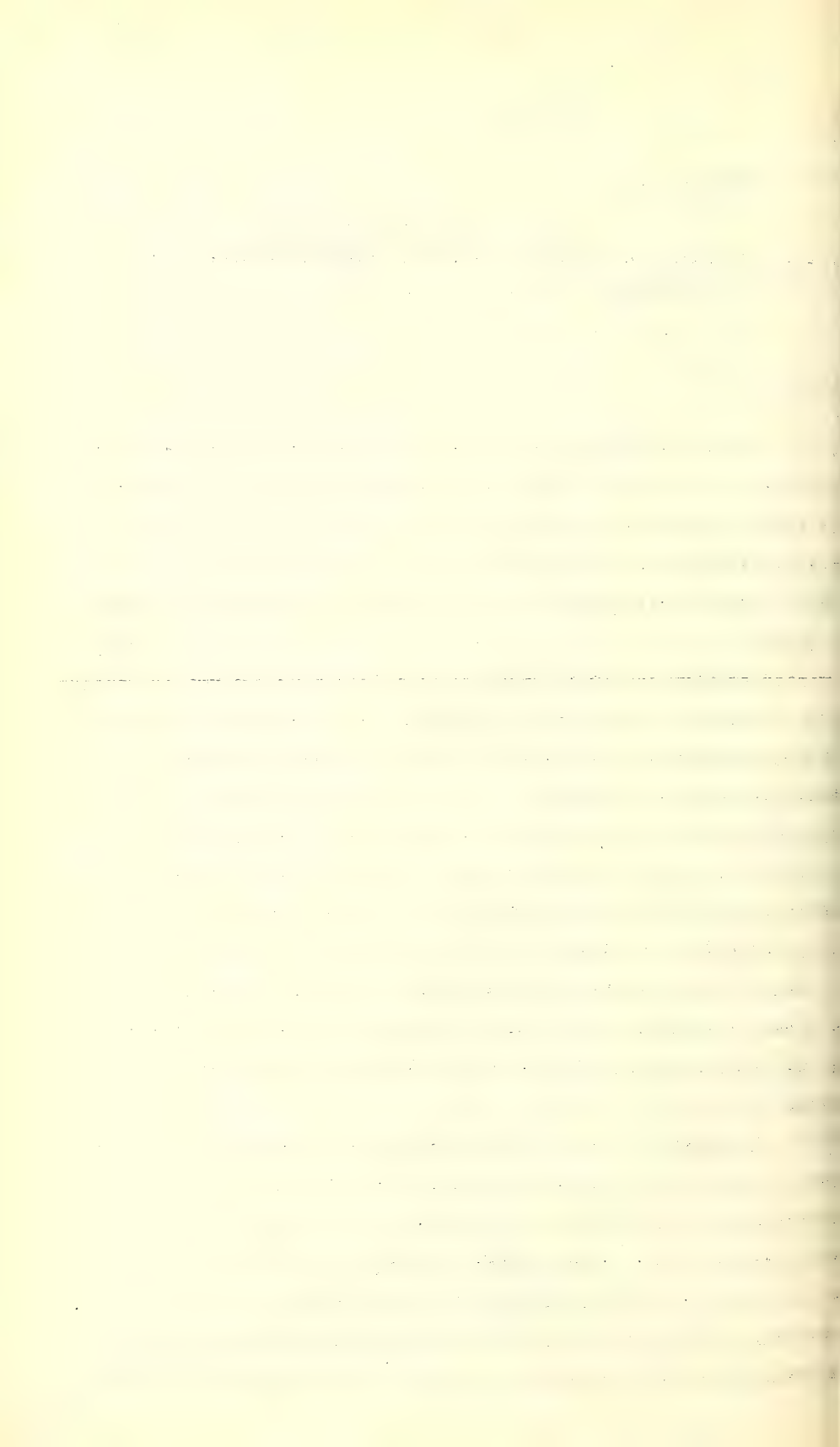
William J. Baker,
Appellee,
vs.
State Bank of Annawan,
Appellant.

241 J.A. 32
Appeal from the Circuit Court
of Henry County.

Partlow, J.

Appellee, William J. Baker, and Nellie J. Baker, his wife, began suit in the circuit court of Henry county against appellant, State Bank of Annawan, to recover money alleged to be due. The suit was dismissed as to the wife. There was a verdict and judgment against appellant for \$19,946, and an appeal has been prosecuted to this court.

The declaration consisted of the common counts, and one special count which charged that on March 17, 1921, appellee and wife loaned to appellant, \$17,000, and appellant promised to repay on demand, together with interest at four per cent per annum; that if no demand or payment was made before March 17, 1922, appellant would pay interest at six per cent per annum; that on July 1, 1921, appellee demanded payment with interest at four per cent. Attached to the declaration was an affidavit of appellee that he was authorized to make the affidavit on behalf of himself and his wife; that the nature of the demand was for money loaned to appellant at its request, together with interest thereon. Appellant filed the general issue together with notice of special defenses, and an affidavit of merits in which it charged that appellee and his wife were not the joint owners of the \$17,000, but that each was the separate and individual owner of a distinct portion of said sum, and that each took the promissory note of W. H. Holzinger, secured by the personal endorsement of Daniel J. Holzinger and Mell Van Hyfte, as surety, for their portion of said sum; that the appellant did not borrow any money of appellee and his wife, and did not promise to pay the amount demanded,



or any part thereof.

The evidence shows that prior to January 1921, the Bank of Annawan was a private bank owned by William H. Holzinger, and Daniel J. Holzinger, a brother of William, was the cashier. In January, 1921, it was incorporated as a state bank under the name of the State Bank of Annawan, Daniel J. Holzinger continued as its cashier, William H. Holzinger was its vice-president, and both of them were directors. Appellee was a farmer who had been a customer of the bank when it was a private bank and he continued as such after it was incorporated as a state bank. About one and one half years prior to the transaction in question, appellee purchased a farm in Minnesota and borrowed from his wife, \$5000, for which he gave her his note. This money was used in part payment on the Minnesota farm, but the title to the farm was taken in the name of appellee. During the winter of 1920 and 1921, appellee sold this farm and was to receive \$17,000 on March 1, 1921. About March 10, 1921, appellee claims he had a conversation with the cashier of the bank with reference to letting the bank have the money. There is a conflict in the evidence on this point, but it is claimed by appellee that the cashier told him that if he would let the bank have the money the bank would pay him six per cent provided he left it for one year. Appellee testified he told the cashier he did not care to leave the money in the bank for a year; that he might purchase a farm and wanted the money at such time. The cashier told him if he would put the money in the bank, the bank would get some of its directors to sign a note as security.

On March 15, 1921, appellee received the money in two drafts payable to his order. He deposited the drafts in his name. He testified he had a conversation with the cashier in which the cashier told him he would have a note signed by some of the directors. A note was signed by Mell Van Hefte, who at that time was a director of the bank. This note was left at the bank and appellee went to his home where he had a conversation with his wife relative to the matter.



The wife then had a conversation over the telephone with the cashier. Just what this conversation was does not appear, but the evidence shows that after this conversation, the cashier destroyed the \$17,000 note signed by Van Hefte, and made out two notes, one for \$11,725, payable to appellee, and one for \$5,275, payable to the wife, which notes were signed by Daniel J. Holzinger, W. H. Holzinger and Mell Van Hefte, in the order named. The next day the cashier told appellee he had the two notes, and they had been signed by some of the directors. Appellee drew his personal check for \$17,000, payable to the appellant, and gave the check to the cashier. The two notes were delivered to appellee and he testified that after he looked them over he asked the cashier if he would put the amount of the check to appellee and his wife's credit on the books of the bank, and the cashier replied that he would, but this was never done. In September 1921, appellee told the cashier he was about to buy a farm and wanted his money in thirty days. The cashier replied that money was tight, and the bank would have to have sixty days. Appellee told the cashier to get it as soon as he could. In October, 1921, the bank was temporarily closed by the State Auditor, but was afterwards reopened. After the bank was closed, appellee made a demand for his money. He did not get it, and he went to William H. Holzinger and demanded additional security, and Holzinger stated that he would get his brother Harvey to give a second mortgage to William H. Holzinger on his farm in Iowa, and that he would assign the mortgage to Mrs. Baker. Holzinger obtained the mortgage for \$5,500, and assigned it to Mrs. Baker. This was a second mortgage subject to a prior lien of \$10,000.

At the time the suit was commenced, appellee and his wife were plaintiffs, and the evidence was all heard under those pleadings. At the close of the evidence a question arose as to who was the proper parties plaintiff. The court held that the suit could not be maintained in the joint name of appellee and his wife; that it could be maintained in the name of appellee alone, whereupon the suit was



dismissed as to Mrs. Baker, the declaration was amended so as to make the action by appellee alone, and judgment was rendered accordingly.

Appellant contends that the loan was made to W. H. Holzinger and not to appellant. Appellee testified to several conversations he had with the cashier before the loan was made which conversations show that the loan was made to appellant. There are facts and circumstances in evidence which corroborate appellee in this respect. On the other hand the cashier denies the substance of all of these conversations. His evidence is that the loan was made to W. H. Holzinger and in this he is corroborated to a certain extent. Evidence was offered by appellee that the general reputation of the cashier and W. H. Holzinger for truth and veracity was bad. Evidence was offered to sustain the good reputation of the cashier for truth and veracity, but no evidence was offered to sustain the general reputation of W. H. Holzinger. Under this condition of the proof, it was a question of fact for the jury to say to whom the loan was made. If the jury believed the evidence offered by appellee and did not believe the evidence offered by appellant they were justified in finding that the loan was made to appellant. The verdict in this respect was not against the weight of the evidence and we are not justified in reversing the judgment on that ground.

It is also insisted by appellant that the evidence does not show that appellee was the owner of the entire amount for which the suit was brought, hence the judgment in his favor for the whole amount is erroneous. In order for appellee to be entitled to a judgment for the whole amount it was necessary for him to prove that he had the legal title to the whole amount. The fact that his wife might have had an equitable interest in some of it did not bar his right to recover all of it provided he had the legal title to all of it. Chadsey vs. Lewis, 6 Ill. 153; Ridgely Nat. Bank vs. Patton, 109 Ill. 479; Tarrant vs. Burch, 102 Ill. App. 393; Reed vs. New York Bank, 135 Ill. App. 170; 30 Cyc 33. His right was not lost



changed by the fact that appellee may have erroneously commenced his suit in the name of himself and his wife, and in his affidavit of merits attached to the declaration and in his evidence he swore that the amount due belonged to them jointly. He later testified to the facts on which his conclusion as to ownership were based. If the facts testified to by him showed that he had the legal title to the entire amount, and such facts constituted a preponderance of the evidence, then he had a right to recover notwithstanding his prior testimony that the money was the joint property of himself and his wife. 22 R. C. L. 78.

It appears from the evidence that when appellee bought the Minnesota farm, he borrowed \$5000 from his wife and gave her his note therefor. This vested the legal title to the \$5000 in him. The title to the farm was taken in his name. When it was sold the drafts were payable to him and were deposited by him in his own name in the bank. He owed his wife \$5000 and probably intended to pay her, but he did not do so, therefore he still had the legal title to the whole amount when negotiations were begun with the cashier to loan the money. When these negotiations were completed and the two notes were delivered to him, he drew his personal check for the whole amount, payable to appellant, and delivered it to the cashier. Both notes were delivered to him and there is no evidence that either was ever delivered to the wife. He had both of them in his possession at the trial and offered them in evidence. At the time the check was delivered to the cashier appellee testified that he told the cashier to place the amount of the check to the account of appellee and his wife. If this had been done there might be more force in the contention of appellant that this constituted a division of the fund and that the legal title to a part of it vested in the wife. This request of appellee was not complied with. The amount of the check was not placed to the credit of appellee and his wife. Neither of them received any credit for it or any part of it. There is no evidence that the note of \$5000 to appellee's wife was ever paid, cancelled, or



surrendered, or that the debt was ever extinguished. This suit is
based upon the two notes payable to appellee and his wife. It is for
the recovery of the \$17000 paid to the cashier of appellant by
appellee. At the time this money was delivered to the cashier, the
legal title to all of it was in appellee. If the jury believed the
evidence of appellee, then the conditions upon which it was paid to
appellant were never complied with. The contract was never completed
and for that reason, the legal title to the whole fund remained in
appellee. The mere fact that the wife may have had an equitable
interest in a part of the money did not defeat appellee's right of
action if he had the legal title to all of it. Under the evidence
we think the court and jury were justified in finding that the legal
title to the whole amount was in appellee and that appellee had a
right to maintain an action therefor.

It is next insisted by appellant that if appellee was
entitled to recover at all, it must have been upon an express con-
tract; that there was no evidence of an implied contract; that the
court announced that the recovery, if there was to be one, must be
upon an express contract, but notwithstanding this announcement,
instructions were given relative to an implied contract.

The declaration set up an express contract and also included
the common counts. Appellant in its notice of special defenses under
the general issue and in its affidavit of merits denied that there
was an express contract. Appellee's right to recover, under the law,
was not confined to an express contract. He might recover upon
implied assumpsit based upon any grounds which he might be able to
establish, and any evidence which would be competent to establish
his cause of action, in the absence of an express contract, would
be competent. *People vs. Darrow*, 172 Ill. 62; *McCartney vs. Wallace*,
214 Ill. App. 618; *Humphreys vs. Orrey*, 220 Ill. App. 525. A contract
is implied where money has been obtained by fraud, deceit or fraudulent
practices. *Arnold vs. Dodson*, 272 Ill. 377. Implied assumpsit will

lie where money is received with no intent to repay and to cheat the owner out of it. Bocker vs. Wolf, 195 Ill. 365. An action for money had and received lies against one who receives money which is to be applied to a particular purpose and the person receiving it fails to apply it to the agreed purpose but pays it to another who had no right to it. Drovers National Bank vs. O'Hare, 119 Ill. 646; Gray vs. Callender, 181 Ill. 173. If there was an express contract which had been violated and the only duty remaining was to pay the amount due, there could be a recovery for money had and received. Jones vs. Marks, 40 Ill. 313; Larminie vs. Carley, 114 Ill. 196. Assumpsit for money had and received may be maintained where one person has obtained money belonging to another which in equity and good conscience he has no right to retain. In such a case the law implies a promise to repay. Laflin vs. Howe, 112 Ill. 253; National Bank vs. Gatton, 172 Ill. 625; Richalson vs. Moloney, 195 Ill. 575. In the following cases a recovery was permitted where the declaration was on an express contract and the common counts, and where proof was made of an express contract. Leigh vs. American Brake Beam Co., 205 Ill. 147; Evans vs. Howell, 211 Ill. 85; Chicago vs. Duffy, 318 Ill. 242.

Appellee evidently thought he had an express contract and so declared in his declaration. Out of an abundance of caution he added the common counts. His evidence showed an express contract, but this was denied by appellant. It would indeed be a peculiar condition of affairs if he thought he had an express contract, and the evidence failed to establish such a contract, that he could not recover at all, after appellant had obtained his money and refused to pay it back. It is undisputed that the check for \$17000 was payable to appellant. It was delivered to the cashier and across its face appears the following: "State Bank of Annawan, Paid, March 17, 1921, per Annawan, Ill." Appellant admits that it did not pay this check to the payee therein named. If the preponderance of the

evidence showed that appellant received the check and did not pay the money to the person designated by appellee, then appellant owes appellee the amount of the original deposit. A bank cannot charge its depositor with any payment, except such as is made in conformity with the order of the depositor. Gray vs. Collender, Supra; Brovers Bank vs. O'Hare, Supra; Leland vs. Lixon Bank, 111 Ill. 323; 3 R. C. L. p. 541. Under the authorities cited, there was evidence tending to establish several grounds upon which there might be a recovery under an implied contract. Appellee had a right to submit all of these facts to a jury under instructions applicable to an implied contract and the ruling of the court was not erroneous in this respect.

Appellant offered evidence to prove how the \$17000 was credited on the books of the bank. It first offered Exhibit 4 which was a deposit slip made by the cashier showing that all of the money was deposited in his name. Exhibit 5 consisted of certain portions of ledger sheets of the bank showing the account of the cashier and that the deposit was in his name. Exhibit 6 was a deposit slip showing that on April 8, 1921, William H. Holzinger deposited a check for \$5275. Objections were sustained to each of these offers and appellant insists that this was error for the reason that this evidence tended to refute any right of recovery under an implied contract and tended to show that the loan was to W. H. Holzinger and not to appellant. It is claimed by appellant that the entire amount of the check of appellee was credited to the account of the cashier and that about half of the money was used to pay a debt of W. H. Holzinger to appellant, and that the other half was retained by the cashier under some arrangements with his brother.

Exhibits 4 and 6 were properly excluded because the abstract of the evidence does not show that any foundation was laid for their admission and that was one of the grounds of objection by appellee. A general offer was made to prove the verity and correctness of Exhibit 5, but no attempt was made to comply with the offer. We



are asked to assume that such evidence would have established facts sufficient to admit the exhibit in evidence. We do not think the offer was sufficient. It also appears that all of these exhibits were made by the agents of appellant and that appellee had no knowledge of any of them, they were not binding on appellee and were properly excluded.

The by-laws of appellant provided that "no money shall be borrowed on behalf of or for the use of the bank without authority of the board of directors." There was no authority from the board of directors to make this loan. Appellee owned one share of stock in the bank. Appellant insists that appellee as a stockholder was charged with notice of this by-law, hence he cannot recover. It is not contended that appellee had any actual notice of this by-law.

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At the close of the evidence on behalf of appellee, a motion was made to direct a verdict in favor of appellant. The court held that the suit could not be maintained by appellee and his wife. There was a dismissal as to the wife and appellee was granted leave to amend the declaration. Appellant then moved to continue the case to the next term of court and filed an affidavit in support of its motion. The motion was overruled and this ruling is assigned as error. The only amendment^s to the declaration were such as were made necessary by



the dismissal as to the wife. No new issues were presented. The affidavit for a continuance alleged that it would require several days time in which to investigate the law and prepare the pleadings and a much longer time to close the issues presented by the amended declaration. The court continued the hearing from July 9 to July 12 when the trial proceeded and appellant presented its evidence in defense. We do not think there was any abuse of the discretion of the court in this matter and that appellant was not injured by the refusal of the court to continue the case for the term.

During the trial the court announced that the jury would be instructed that they must determine the liability of appellant from the conversations between the parties. It is insisted that appellee acquiesced in this announcement and thereby estopped himself from recovering on the common counts for money had and received, or upon an implied contract; that the court later shifted its position on this question and gave to the jury instructions with reference to an implied contract; that the case was tried upon one theory and the jury was instructed upon another theory; that practically all of the instructions given on behalf of appellee were erroneous and those refused on behalf of appellant should have been given, and each instruction is argued separately.

It will be impossible to consider these instructions in detail. As we understand the complaints of appellant, they are that the instructions authorized a recovery on either an express contract or an implied contract; that some of them refer to the \$17000 as a deposit; that others authorize a verdict upon an implied contract if the jury believed appellant received money from appellee under such circumstances as in equity and good conscience appellant should repay the same; that some of them assume that appellee was the owner of the money and ignore what appellant contends was a disputed question of fact as to the ownership of a part of the fund by the wife.

We do not think any of these contentions are justified.

Abstract

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 632

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MOE the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

*Subsequently decided
and opinion shown by
modified
about 27, 1926
(7)*

Tri-City Artificial Ice

Company, a corporation,

appellee,

vs.

Appeal from the Circuit Court

of Rock Island County.

Sturtevant-Baker Company,

a corporation,

appellant.

241 I.A. 632

Partlow, J.

On December 22, 1922, appellee, Tri-City Artificial Ice Company, a corporation, began suit in the Circuit court of Rock Island county against appellant Sturtevant-Baker Company, a corporation, to recover damages for breach of a contract for the sale of ice from April 1, 1921, to April 1, 1924. There was a trial by jury, verdict and judgment in favor of appellee for \$4811.00, and an appeal has been prosecuted to this court.

Appellee was a manufacturer of artificial ice in the city of Rock Island, and appellant was a manufacturer of ice cream and a retail dealer in ice in the same city. On March 31, 1921, a written contract was entered into between the parties in which appellee is designated as the seller and appellant is designated as the buyer. The material parts of the contract are as follows:

"(2) the seller is to keep in operation its plant in Rock Island, for the supply of artificial ice, under this contract, except for such interruptions as are beyond the control of the seller, and will sell to the buyer up to a maximum of:

"1,200 tons of ice during the period from April 1, 1921, to April 1, 1922.

"2,000 tons of ice during the period from April 1, 1922, to April 1, 1923.

"2,000 tons of ice during the period from April 1, 1923, to April 1, 1924.

"Provided, however, that the quantity of ice, which the seller shall be required to deliver on demand to the buyer, under this contract, shall not exceed during the period from April 1, 1921, to April 1, 1922, the following amounts:

"15 per cent of the year's supply, or 180 tons, during the month of June.

"20 per cent of the year's supply, or 240 tons, during the month of July.

Artificial Ice

Sturtivant-Baker Company, a corporation,

appellee,

Appeal from the Circuit Court

of Rock Island County.

vs.

Sturtivant-Baker Company,

a corporation,

appellant.

Below, J.

On December 22, 1932, appellee, Tri-City Artificial Ice Company, a corporation, began suit in the Circuit Court of Rock Island County against appellant Sturtivant-Baker Company, a corporation, to recover damages for breach of a contract for the sale of ice from April 1, 1931, to April 1, 1934. There was a trial by jury, verdict and judgment in favor of appellee for \$4811.00, and an appeal has been prosecuted to this court.

Appellee was a manufacturer of artificial ice in the city of Rock Island, and appellant was a manufacturer of ice cream and a retail dealer in ice in the same city. On March 31, 1931, a written contract was entered into between the parties in which appellee is designated as the seller and appellant is designated as the buyer. The material parts of the contract are as follows:

"(2) the seller is to keep in operation its plant in Rock Island, for the supply of artificial ice, under this contract, except for such interruptions as are beyond the control of the seller, and will sell to the buyer up to a maximum of:

"1,800 tons of ice during the period from April 1, 1931, to April 1, 1932.
 "2,000 tons of ice during the period from April 1, 1932, to April 1, 1933.
 "2,000 tons of ice during the period from April 1, 1933, to April 1, 1934.

"Provided, however, that the quantity of ice, which the seller shall be required to deliver on demand to the buyer, under this contract, shall not exceed during the period from April 1, 1931, to April 1, 1932, the following amounts:

"15 per cent of the year's supply, or 180 tons, during the month of June.
 "20 per cent of the year's supply, or 240 tons, during the month of July.

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"20 per cent of the year's supply, or 240 tons, during the month of August.

"14 per cent of the year's supply, or 168 tons, during the month of September.

"And during the months of June, July and August of the calendar years of 1922 and 1923 the amounts shall not exceed:

"15 per cent of the year's supply, or 300 tons, during the month of June.

"20 per cent of the year's supply, or 400 tons, during the month of July.

"20 per cent of the year's supply, or 400 tons, during the month of August.

"14 per cent of the year's supply, or 280 tons, during the month of September.

"(3) The seller agrees to set aside and reserve for the buyer the full tonnage mentioned above, but the buyer, in lieu of agreeing to take this full tonnage, at the time herein provided, agrees neither to use nor sell ice obtained from any other source until after said buyer has purchased the full tonnage set aside and reserved for him as herein provided.

"(4) The buyer is to pay the seller at the rate of three dollars and fifty cents (\$3.50) per ton for all ice purchased under this contract, except that in case the rate for electric power by seller is increased or reduced, the price for ice under this contract is to be accordingly increased or reduced by six and one-fourth cents per ton for each one-tenth of a cent increase or reduction in the kilowatt-hour charge for electric energy.

"(5) Ice is to be delivered to the buyer by the seller in the storage room of the seller.

"(6) This contract shall be in force and effect from April 1, 1921, to April 1, 1924.

"(7) All ice sold by the seller to the buyer under this contract shall be of a merchantable kind.

The evidence shows that after the contract was entered into the parties entered upon its performance, and appellant took and paid for all the ice required up to April 1, 1922. For the year beginning April 1, 1922, appellant, up to July 5, 1922, took and paid for 1209 tons, and then ceased to take any more ice under the contract. In November, 1921, appellant began the erection of an ice plant for the manufacture of ice, and began manufacturing ice on July 1, 1922, which it used in its own business and sold in large quantities to other parties. On August 10, 1922, appellee wrote appellant asking when and in what quantities appellant would take the remainder of the ice as provided in the contract, but no reply was received. On August

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"(6) This contract shall be in force and effect from April 1, 1921, to April 1, 1924.

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28, 1922, there was a conversation between the officers of the two corporations in which it is claimed by appellee that the secretary of appellant notified appellee that appellant did not intend to take any more ice. On August ¹⁰~~22~~, 1922, appellee wrote a letter to appellant in which it stated that appellee had ice in storage for appellant and asked appellant whether or not it would take the ice. On August 31, 1922, a similar letter was written to appellant by appellee. On September 8, 1922, appellant demanded in writing 1080 tons of ice to be delivered at once. On September 21, 1922, appellee replied to the written demand in which it told appellant that if it wanted ice to call for it with its trucks as it had always done and that the demand would be complied with. On September 28, 1922, an officer of appellee called upon appellant to get information with reference to the intention of appellant relative to the contract and claims that he was informed by appellant that no more ice would be taken. This is denied by appellant. After July 5, 1922, no more ice was taken by appellant, and this suit was commenced on December 22, 1922.

By the second paragraph of the contract appellee explicitly bound itself to sell a specific quantity of ice. By the third paragraph, appellant, in lieu of agreeing to take the full tonnage specified, at the time therein provided, agreed neither to use nor sell ice obtained from any other source until after appellant had purchased the full tonnage set aside and reserved for appellant as provided in the contract. Appellant insists that the contract was lacking in mutuality; that appellee was bound to sell, but that appellant was not bound to buy, therefore neither was bound, the contract was void, and cannot be enforced; also that the contract is indefinite and uncertain as to the amount of ice appellant was to take.

It is elementary that a promise for a promise is not a good consideration unless there is mutuality, so that each party may hold the other to the performance of the engagement. If one is not bound, the other is not bound. *Olney v. Howe*, 89 Ill. 560; *Plumb v. Campbell*, 129 Ill. 101; *Bauer v. Lumaghi Coal Co.* 209 Ill. 216; *Schlitz Brewing*

11, 1932, there was a conversation between the officers of the two corporations in which it is claimed by appellee that the secretary of appellant notified appellee that appellee did not intend to take any more ice. On August 21, 1932, appellee wrote a letter to appellant in which it stated that appellee had ice in storage for appellant and asked appellee whether or not it would take the ice. On August 21, 1932, a similar letter was written to appellee by appellee. On September 8, 1932, appellee demanded in writing 1080 tons of ice to be delivered at once. On September 21, 1932, appellee replied to the written demand in which it told appellee that it wanted ice to call for it with its trucks as it had always done and that the ice would be complied with. On September 28, 1932, an officer of appellee called upon appellee to get information with reference to the intention of appellee relative to the contract and claims that he was informed by appellee that no more ice would be taken. This is denied by appellee. After July 5, 1932, no more ice was taken by appellee, and this suit was commenced on December 23, 1932.

By the third paragraph, appellee, in lieu of agreeing to take the full tonnage specified, at the time therein provided, agreed neither to use nor sell ice obtained from any other source until after appellee had purchased the full tonnage set aside and reserved for appellee as provided in the contract. Appellant insists that the contract was binding in mutualty; that appellee was bound to sell, but that appellee was not bound to buy, therefore neither was bound, the contract was void, and cannot be enforced; also that the contract is indefinite and uncertain as to the amount of ice appellee was to take.

It is elementary that a promise for a promise is not a good consideration unless there is mutualty, so that each party may hold the other to the performance of the engagement. If one is not bound, the other is not bound. *O'ney v. Howe*, 89 Ill. 560; *Pump v. Campbell*, 113 Ill. 101; *Bauer v. Lumsford Coal Co.*, 209 Ill. 212; *Schiller Brewing*

Co. v. Komp, 118 Ill. App. 556.

It does not necessarily follow that because the contract does not, upon its face, show mutuality, that it is void, and cannot be enforced. It may, under certain conditions, become mutual and binding by action of the parties. There are many cases in which, although the offer is definite enough, yet the acceptor by merely accepting, has really himself promised to do nothing in return. The most frequent example of this is when one offers to supply another with such goods of a certain kind as he may choose to order, or may wish, during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability. 9 Cyc 327. In Higbie v. Rust, 211 Ill. 333, on page 337, the court said: "Where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined, whether he will want any of the commodity, or what quantity he will want, the contract is void for lack of mutuality." To the same effect are Vogel v. Pekoc, 157 Ill. 239; Joliet Bottling Co. v. Joliet Citizens Brewing Co., 254 Ill. 215; Olson v. Whiffen, 175 Ill. App. 182.

On the other hand, where there is a definite offer, and the acceptor agrees to take such articles as he may need, use, require, or consume in his business, the contract is definite as to the amount and can be enforced.

In National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427, there was a contract between a manufacturer of pig iron and a dealer in pig iron. The contract provided that the manufacturer would supply the dealer, and that the latter would purchase all the pig iron which he should need, use, or consume in his business during the ensuing

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In *Higbie v. Rust*, 211 Ill. 333, on page 337, the court said: "Where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall

buy any quantity whatever, and no method exists by which it can be determined, whether he will want any of the commodity, or what quantity he will want, the contract is void for lack of mutuality." To the same effect are *Vogel v. Pekos*, 167 Ill. 339; *Joliet Bottling Co. v. Citizens Brewing Co.*, 254 Ill. 215; *Olsen v. Whitten*, 175

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In *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, there was a contract between a manufacturer of pig iron and a dealer in pig iron. The contract provided that the manufacturer would supply the dealer, and that the latter would purchase all the pig iron which the dealer used, or consumed in his business.

The contract was, in substance, as follows: "We, the undersigned, do hereby agree to take and pay for so much of the commodity as he may want, and there is no agreement that he shall buy any quantity whatever, and no method exists by which it can be determined, whether he will want any of the commodity, or what quantity he will want, the contract is void for lack of mutuality." To the same effect are *Vogel v. Pekos*, 167 Ill. 339; *Joliet Bottling Co. v. Citizens Brewing Co.*, 254 Ill. 215; *Olsen v. Whitten*, 175 Ill. App. 182.

season, and fixed the limit of time, and it was held that the contract was not wanting in mutuality; that the buyer was as much bound to procure from the seller the pig iron he should need in his business during the stipulated time as the seller was to furnish it.

In *Minnesota Lumber Company v. Whitebreast Coal Company*, 160 Ill. 85, the buyer agreed to buy its requirements of anthracite coal of the seller who was to furnish the same as ordered. It was held that the contract was valid although the amount of coal was not fixed, and the contract was wanting in certainty, and did not bind the buyer to require any coal.

In *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, the contract was that the vendor agreed to sell, ~~the~~ and the vendee agreed to buy, estimated tonnage of 50,000 tons, and it was held that this was an agreement for a practically definite amount to be delivered by the vendor which the vendee was bound to take.

In *Russell v. Excelsior Stove Co.*, 122 Ill. App. 23, it was held that where a party agreed to purchase his requirements of goods, he thereby contracted to purchase what he should need in the regular course of his business and not merely what he might choose to order.

In *Allen Automobile Supply Co. v. Johns-Manville Co.*, 211 Ill. App. 217, a contract by which the seller of batteries agreed to furnish sufficient of the contract commodity to meet the requirements of the purchaser for a twelve month period, and the purchaser agreed to devote its best efforts in promoting the sale of the batteries, it was held that the contract was not void for want of mutuality,

In *Schlitz Brewing Company v. Travi & Corstorta*, 179 Ill. App. 269, there was a contract, whereby the defendant agreed to buy all the beer used in his saloon from the complainant, who agreed to furnish it at a fixed and certain price, it was held that the contract was valid and binding.

In *Lincoln Mining Co. v. Board of Education*, 212 Ill. App. 586, on page 591, it was said: "A contract to furnish such coal as may be needed, required, or consumed by acceptor, during a limited time,

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In Finch & Co. v. Zenith Furnace Co., 248 Ill. 888, the court
held that the vendor agreed to sell, and the vendee agreed to
buy, estimated tonnage of 30,000 tons, and it was held that this was
an agreement for a practically definite amount to be delivered by the
vendor, which the vendee was bound to take.
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it was said: "A contract to furnish such coal as may
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is binding. Such a contract is to be distinguished from one to furnish such coal as the acceptor might want or desire in his business because he is not bound to want or desire any, and such contract is void for want of mutuality."

In *Chalmers & Williams v. Bledsoe Co.*, 218 Ill. App. 263, one party agreed to buy and the other agreed to sell all of the former's consumption requirements of coal for a period of two years, and it was held to be valid and mutually binding upon the parties.

In *Armstrong Paint & Varnish Works v. Continental Can Co.*, 220 Ill. App. 90, the seller agreed to sell, and the buyer agreed to purchase, a minimum of \$2000 worth of tin packages, or more as required by them, which the buyers would need for actual use in their business between certain days, and it was held that the contract should be construed as binding the buyer to purchase, and the seller to deliver, its products to a minimum of \$2000, and that while it did not require the buyer to take in excess of that amount, unless their business requirements necessitated it, it did not permit them, while the contract was in force, to purchase such goods elsewhere, and that by purchasing elsewhere the buyer breached the contract.

In construing contracts courts will endeavor to place themselves in the position of the contracting parties as nearly as may be, considering the circumstances under which the contract was executed, and the previous dealings between the parties, and if there are doubtful terms upon which the parties have, by their conduct, placed a practical construction, the court will adopt such construction so placed. *Gillett v. Teel*, 272 Ill. 106; *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42; *McLain Co. Coal Co. v. City of Bloomington*, 234 Ill. 90; *Consolidated Coal Co. v. Jones & Adams Co.*, 232 Ill. 326; *Purcell v. Sage*, 200 Ill. 342.

In *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, on page 433, the court said: "It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed

upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron, but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of contract. It was bound by the contract to take of appellant at the price named, its entire supply of iron for the year, - that is, such a quantity of iron, in view of the situation and business of appellee as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual."

In *Peterson v. Timken Roller Bearing Co.*, 223 Ill. App. 54, the buyer agreed not to purchase on the open market, or otherwise, any goods of the quality mentioned in the contract until the quantity mentioned in the contract was accepted from the seller, and he agreed not to resell any oil without the consent of the seller. The contract required ten days prior notice from the buyer to the seller in the event the buyer's plant would not consume the monthly minimum specified in the contract, all of which were held to amount to a contract for the buyer's needs or requirements. On page 60, the court said: "The contract should be construed with due regard to the surrounding circumstances, the nature of the subject matter, the position of the parties, and the apparent and known purposes for which the contract was made so that the language may be understood in the sense intended by the parties."

In *Plumb v. Campbell*, 129 Ill. on page 101, the contract was only signed by one of the parties and there was no agreement on behalf of the other party to do anything under the contract and suit

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are not unusual."

In Peterson v. Timken Roller Bearing Co., 222 Ill. App. 54,
the court stated that in contracts of this kind, the quantity
of goods of the quality mentioned in the contract until the quantity
mentioned in the contract was accepted from the seller, and he agreed
not to resell any of the goods until the amount of the contract
required has been received from the buyer or the seller is the
event the buyer's claim would not survive the contract's expiration.
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contract for the buyer's needs or requirements. On page 60, the
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the surrounding circumstances, the nature of the subject matter, the
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sense intended by the parties."

In Pump v. Campbell, 129 Ill. on page 101, the contract was
only signed by one of the parties and there was no agreement on
behalf of the other party to do anything under the contract and suit

was brought for breach of the contract. On page 106, the court laid down the following rule which we think is applicable to the facts in this case: "The contention of appellant is, that for want of an agreement on the part of appellee to do anything on his part, as shown by the writing, there is want of that mutuality which is necessary to every complete contract. A promise for a promise is not a good consideration, unless there is mutuality, so that each party may hold the other to the performance of his engagements. It does not follow, however, that a contract in writing, to be complete, must show such mutuality on its face. There is a seeming want of mutuality in many cases of contract which may be enforced by the parties on the same proof as would have been necessary had that mutuality fully appeared, - as where one promises to see another paid if he will sell goods to a third person, or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings or the like. (I Parsons on Contracts, Sec. 450.) In commenting on this class of cases the author says: "Here it is said that the party making the promise is bound, while the other is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does, or begins to do, the thing which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality and therefore no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation." * * * A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee. (Citing cases). These contracts are called unilateral contracts. Proof of assent is not necessary on the part of the promisee. It is sufficient if the required act be performed by him.

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promisee. It is sufficient if the required act be performed by him.

Hare on Contracts, 304. On the authorities, it is clear that the appellant could be bound, under the writing, in either of three ways: First by appellee engaging, within a reasonable time, to perform the contract on his part; second by beginning such performance in a way which would bind him to complete it; and third by actual performance."

In *Cortelyou v. Barnsdall*, 236 Ill. 138, an oil and gas lease did not bind the lessee, and it was held that it could be revoked at any time before the lessee had by some act done after the signing of the agreement, accepted or bound himself to exercise the option granted by the writing.

In *Miller v. Moffat*, 153 Ill. App. 1, there was a contract for mining coal, but the contract did not provide that appellee should mine the coal. If he mined the coal, however, he was to pay a price fixed in the contract. On page 4 it was said: "It is an elementary principle of the law of contract that if one party to a contract is under no obligation to perform at all, the contract is void. A contract to be binding and enforceable must have at its inception absolute mutuality. Chitty on Contracts, 13; Addison on Contracts, Vol. 1, Sec. 18; Bishop on Contracts, Sec. 429; *Cortelyou v. Barnsdall*, 236 Ill. 130. A promise for a promise is not a good consideration unless there is mutuality so that each party may hold the other to the performance of his agreement. *Plumb v. Campbell*, 129 Ill. 191. * * * Where a party not bound to perform under the terms of a unilateral agreement, within a reasonable time, performs, or begins to do the thing ~~in~~ in a way which binds him to complete it, this supplies the want of mutuality, and is a sufficient consideration to support the promise of the other party." See also *Corbett v. Cronkhite*, 239 Ill. 9.

When we apply the rules announced in the above cases to the facts now before us we conclude that the contract was mutual and binding. Appellant was a large manufacturer of ice cream and was also a retail dealer in ice. In its business it used a large quantity of ice. It had purchased ice of appellee prior to the date of the contract in question. The contract was entered into for the purpose of supplying appellant with ice up to the amount specified in the

On the authorities, it is clear that the contract could be bound, under the writing, in either of three ways: first by appellee engaging, within a reasonable time, to perform the contract on his part; second by beginning such performance in a way which would bind him to complete it; and third by actual performance." In *Cortelov v. Barnaball*, 236 Ill. 138, an oil and gas lease was not binding the lessee, and it was held that it could be revoked at any time before the lessee had by some act done after the signing of the agreement, accepted or bound himself to exercise the option granted by the writing.

In *Miller v. Moffat*, 153 Ill. App. 2, there was a contract for the sale of coal, but the contract did not provide that appellee should mine the coal. If he mined the coal, however, he was to pay a price therefor. It was said: "It is an elementary principle of the law of contract that if one party to a contract is bound to perform, the other party is bound to accept the performance." This is the principle of mutual obligation. See *Chitty on Contracts*, 13; *Addison on Contracts*, 10. 1, sec. 18; *Blasch on Contracts*, sec. 429; *Cortelov v. Barnaball*, 236 Ill. 130. A promise for a promise is not a good consideration. See *mutual obligation*. The performance of his agreement. *Blum v. Campbell*, 132 Ill. 121.

Where a party not bound to perform under the terms of a unilateral agreement, within a reasonable time, performs, or begins to do the thing in a way which binds him to complete it, this supplies the want of mutuality, and is a sufficient consideration to support the promise of the other party." See also *Corbett v. Grombath*, 239 Ill. 2.

Appellant was a large manufacturer of ice cream and was also a retail dealer in ice. In its business it used a large quantity of ice. It had purchased ice of appellee prior to the date of the contract in question. The contract was entered into for the purpose

contract for a period of three years. The presumption was that the appellant would continue to want ice during the period specified in the contract, and that it would not go out of business during that time. The evidence shows that it did not go out of business, but continued in business until after the expiration of the contract. Appellant agreed neither to use nor sell ice obtained from any other source until after appellant had purchased the full tonnage set aside and reserved for him by appellee as provided in the contract. We think the facts in this case ~~are~~ do not fall within the rule announced in Higbie v. Rust, supra, that appellant only contracted for such ice as it might want, wish, desire, or choose to order, but the facts fall within the rules announced in the other cases cited, to the effect that if the contract was binding at all, it bound the appellant to do exactly what the contract said he shall do, namely, not to sell ice obtained from any other source until after appellant had purchased the full tonnage set aside and reserved for him as provided in the contract. If appellant had gone out of business after the contract was executed and before it had been put in operation, and had not sold nor used ice during the period covered by the contract, there could be no damages recovered because appellant only agreed not to sell or use ice obtained from other sources until after he had purchased the full tonnage provided for in the contract. As long as the contract was merely executory there could be no damages. But appellant did not see fit to permit the contract to remain executory. It entered upon the performance of the contract. It bought under the contract the first year's supply of ice, and the major portion of the supply for the second year. It continued in business and used and sold ice until the end of the time specified in the contract and in greater quantities than those therein specified. Appellant by its acts in taking ice, at regular intervals, for a period of over fifteen months, in all respects as provided in the contract, recognized the validity of the contract, and is bound by the interpretation it placed upon it. If it be conceded that the contract, in the first

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time. The evidence shows that it did not go out of business, but
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instance, was not binding because it lacked mutuality, yet after it was partly carried out by appellant, such part performance remedied the defect of lack of mutuality, and appellant became bound, and was in the same position it would have been in if it had agreed in the original contract to buy the ice. We are also of the opinion that the amount of ice required was not indefinite and uncertain; that this was one entire contract for a period of three years; that it cannot be construed as a contract for separate years which, in case of breaches, would require separate suits. If appellant, before the suit was commenced repudiated the contract and refused to take any more ice, such repudiation entitled appellee to begin suit at once and recover all damages sustained by reason of such breach. *Chicago Washed Coal Co. v. Whitsett*, 278 Ill. 623; *Lake Shore and Michigan Southern Ry. Co. v. Richards*, 152 Ill. 59; *Mt. Hope Cemetery Association v. Weidemann*, 139 Ill. 67; *City of Elgin v. Joslyn*, 136 Ill. 525.

Appellant insists that there was no breach of the contract upon its part; and if there was a breach it was waived by appellee. The evidence with reference to a breach consists of letters between the parties and oral testimony. The question as to whether there was a breach was one of fact for the jury. The first instruction given on behalf of appellee told the jury to find the issues for appellee, and that the only question for the jury to determine was the question of the amount of the damages. All instructions tendered by appellant on the question as to whether there had been a breach were refused. The only instruction as to the form of a verdict directed the jury to find the issues in favor of appellee and assess the damages. Before the argument began the court announced that counsel for appellant would not be permitted to argue to the jury the question of the liability of appellant, and would not be permitted to argue any question except the amount of the damages. In these respects we think the court was in error. The construction of the contract was for the court, but whether the contract had been breached depended upon oral and

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Appellant insists that there was no breach of the contract upon its part; and if there was a breach it was waived by appellee. The evidence with reference to a breach consists of letters between the parties and oral testimony. The question as to whether there was a breach was one of fact for the jury. The first instruction given on behalf of appellee told the jury to find the issues for appellee, that the only question for the jury to determine was the question of the amount of the damages. All instructions tendered by appellant on the question as to whether there had been a breach were refused. The only instruction as to the form of a verdict directed the jury to find the issues in favor of appellee and assess the damages. Before the argument began the court announced that counsel for appellant would not be permitted to argue to the jury the question of the liability of appellant, and would not be permitted to argue any question except the amount of the damages. In these respects we think the court was in error. The construction of the contract was for the court, and it was the duty of the court to determine whether there was a breach.

written evidence and was for the jury, and that question should have been submitted to the jury after proper argument had been made and proper instructions given.

Complaint is made that the jury was improperly instructed as to the measure of damages. Par. ⁶³⁻¹⁴³⁻⁶⁵ ~~62~~, ~~section~~, Chapter 121A, of the Statute of Uniform Sales (Smith's Statute 1925, page 2271) fixes the measure of damages and it will be unnecessary for us to consider the instructions in detail.

On account of the errors indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

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the measure of damages and it will be unnecessary for us to consider

the instructions in detail.

On account of the errors indicated the judgment will be reversed

and the case remanded.

Reversed and Remanded.

STATE OF ILLINOIS, ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 30th day of
May, in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court.

TRI-CITY ARTIFICIAL ICE
COMPANY, A CORPORATION,
Appellee,

-vs-

STUTEVANT-BAKER COMPANY,
A CORPORATION,
Appellant.

241 I.A. 632

Appeal from the
Circuit Court of
Rock Island County.

PARTLOW, J:

On December 22, 1922, appellee, Tri-City Artificial Ice Company, a corporation, began suit in the Circuit court of Rock Island county against appellant Stutevant-Baker Company, a corporation, to recover damages for breach of a contract for the sale of ice from April 1, 1921, to April 1, 1924. There was a trial by jury, verdict and judgment in favor of appellee for \$4811.00, and an appeal has been prosecuted to this court.

Appellee was a manufacturer of artificial ice in the city of Rock Island, and appellant was a manufacturer of ice cream and a retail dealer in ice in the same city. On March 31, 1921, a written contract was entered into between the parties in which appellee is designated as the seller and appellant is designated as the buyer. The material parts of the contract are as follows:

"(2) The seller is to keep in operation its plant in Rock Island, for the supply of artificial ice, under this contract, except for such interruptions as are beyond the control of the seller, and will sell to the buyer up to a maximum of:

"1,200 tons of ice during the period from April 1, 1921, to April 1, 1922.

"2,000 tons of ice during the period from April 1, 1922, to April 1, 1923.

"2,000 tons of ice during the period from April 1, 1923, to April 1, 1924.

"Provided, however, that the quantity of ice, which the seller shall be required to deliver on demand to the buyer, under this contract, shall not exceed during the period from April 1, 1921, to April 1, 1922, the following amounts:

"15 per cent of the year's supply, or 180 tons, during the month of June.

"20 per cent of the year's supply, or 240 tons, during the month of July.

"20 per cent of the year's supply, or 240 tons, during the month of August.

"14 per cent of the year's supply, or 168 tons, during the month of September.

"And during the months of June, July and August of the calendar years of 1922 and 1923 the amounts shall not exceed:

"15 per cent of the year's supply, or 300 tons, during the month of June.

"20 per cent of the year's supply, or 400 tons, during the month of July.

"20 per cent of the year's supply, or 400 tons, during the month of August.

"14 per cent of the year's supply, or 280 tons, during the month of September.

"(3) The seller agrees to set aside and reserve for the buyer the full tonnage mentioned above, but the buyer, in lieu of agreeing to take this full tonnage, at the time herein provided, agrees neither to use nor sell ice obtained from any other source until after said buyer has purchased the full tonnage set aside and reserved for him as herein provided.

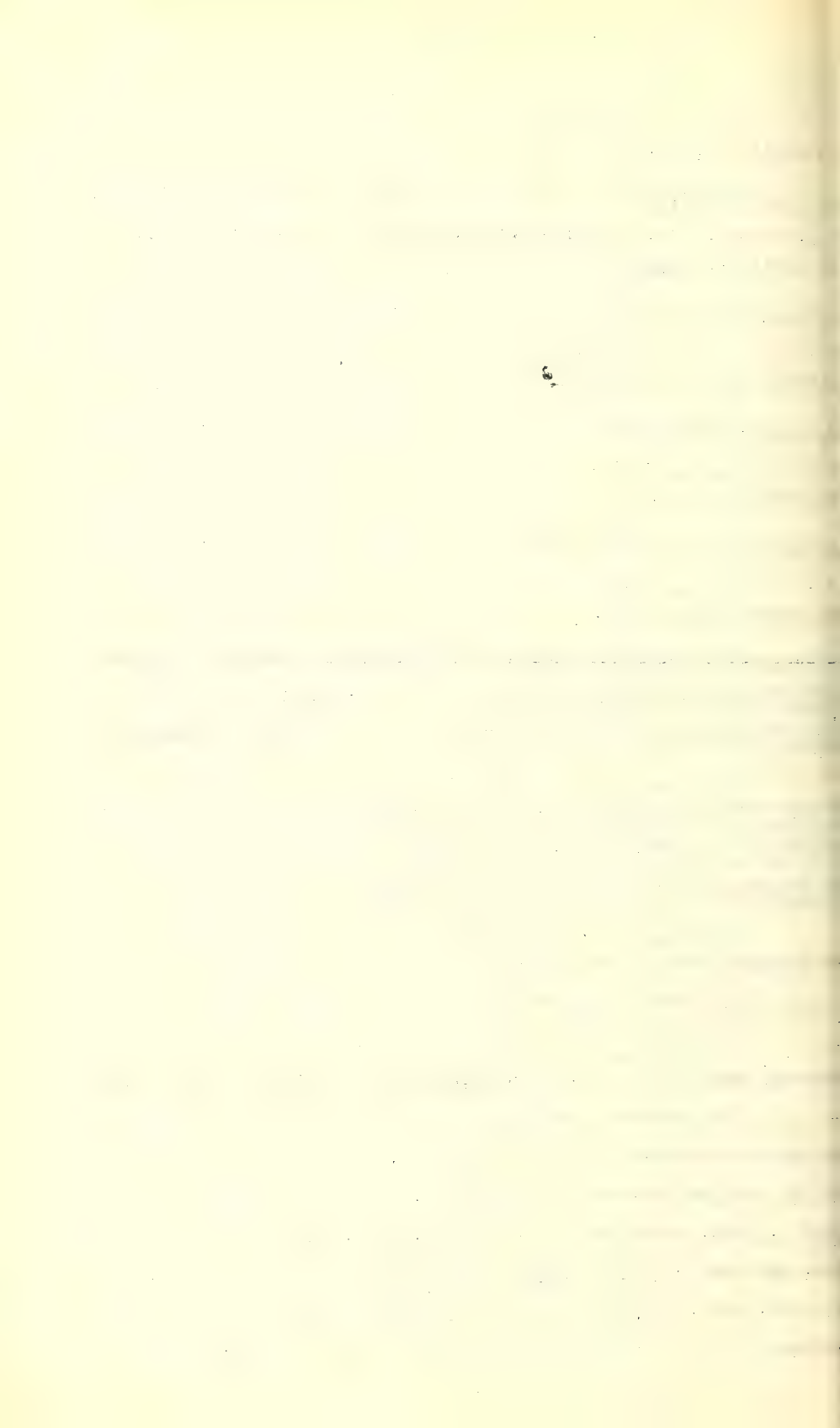
"(4) The buyer is to pay the seller at the rate of three dollars and fifty cents (\$3.50) per ton for all ice purchased under this contract, except that in case the rate for electric power by seller is increased or reduced, the price for ice under this contract is to be accordingly increased or reduced by six and one-fourth cents per ton for each one-tenth of a cent increase or reduction in the kilowatt-hour charge for electrical energy.

"(5) Ice is to be delivered to the buyer by the seller in the storage room of the seller.

"(6) This contract shall be in force and effect from April 1, 1921, to April 1, 1924.

"(7) All ice sold by the seller to the buyer under this contract shall be of a merchantable kind.

The evidence shows that after the contract was entered into the parties entered upon its performance, and appellant took and paid for all the ice required up to April 1, 1922. For the year beginning April 1, 1922, appellant, up to July 5, 1922, took and paid for 1209 tons, and then ceased to take any more ice under the contract. In November, 1921, appellant began the erection of an ice plant for the manufacture of ice, and began manufacturing ice on July 1, 1922, which



it used in its own business and sold in large quantities to other parties. On August 10, 1922, appellee wrote appellant asking when and in what quantities appellant would take the remainder of the ice as provided in the contract, but no reply was received. On August 28, 1922, there was a conversation between the officers of the two corporations in which it is claimed by appellee that the secretary of appellant notified appellee that appellant did not intend to take any more ice. On August 18, 1922, appellee wrote a letter to appellant in which it stated that appellee had ice in storage for appellant and asked appellant whether or not it would take the ice. On August 31, 1922, a similar letter was written to appellant by appellee. On September 8, 1922, appellant demanded in writing 1080 tons of ice to be delivered at once. On September 21, 1922, appellee replied to the written demand in which it told appellant that if it wanted ice to call for it with its trucks as it had always done and that the demand would be complied with. On September 28, 1922, an officer of appellee called upon appellant to get information with reference to the intention of appellant relative to the contract and claims that he was informed by appellant that no more ice would be taken. This is denied by appellant. After July 5, 1922, no more ice was taken by appellant, and this suit was commenced on December 22, 1922.

By the second paragraph of the contract appellee explicitly bound itself to sell a specific quantity of ice. By the third paragraph, appellant, in lieu of agreeing to take the full tonnage specified, at the time therein provided, agreed neither to use nor sell ice obtained from any other source until after appellant had purchased the full tonnage set aside and reserved for appellant as provided in the contract. Appellant insists that the contract was lacking in mutuality; that appellee was bound to sell, but that appellant was not bound to buy, therefore neither was bound, the contract was void, and cannot be enforced; also that the contract is indefinite and uncertain as to the amount of ice appellant was to take.

It is elementary that a promise for a promise is not a good consideration unless there is mutuality, so that each party may hold the other to the performance of the engagement. If one is not bound, the other is not bound. *Olney vs. Howe*, 89 Ill. 560; *Plumb vs. Campbell*, 129 Ill. 101; *Bauer vs. Lumaghi Coal Co.*, 209 Ill. 316; *Schlitz Brewing Co. vs. Komp*, 118 Ill. App. 556.

It does not necessarily follow that because the contract does not, upon its face, show mutuality, that it is void, and cannot be enforced. It may, under certain conditions, become mutual and binding by action of the parties. There are many cases in which, although the offer is definite enough, yet the acceptor by merely accepting, has really himself promised to do nothing in return. The most frequent example of this is when one offers to supply another with such goods of a certain kind as he may choose to order, or may wish, during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no legal liability. 9 Cyc 327. In *Higbie vs. Rust*, 211 Ill. 333, on page 337, the court said: "There there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined, whether he will want any of the commodity, or what quantity he will want, the contract is void for lack of mutuality." To the same effect are *Vogel vs. Pekoc*, 157 Ill. 239; *Joliet Bottling Co. vs. Joliet Citizens Brewing Co.*, 254 Ill. 215; *Olson vs. Whiffen*, 175 Ill. App. 182.

On the other hand, where there is a definite offer, and the acceptor agrees to take such articles as he may need, use, require, or consume in his business, the contract is definite as to the amount and can be enforced.

In National Furnace Co. vs. Keystone Mfg. Co., 110 Ill.

27, there was a contract between a manufacturer of pig iron and a dealer in pig iron. The contract provided that the manufacturer could supply the dealer, and that the latter would purchase all the pig iron which he should need, use, or consume in his business during the ensuing season, and fixed the limit of time, and it was held that the contract was not wanting in mutuality; that the buyer was as much bound to procure from the seller the pig iron he should need in his business during the stipulated time as the seller was to furnish it.

In Minnesota Lumber Company vs. Whitebreast Coal Company, 160 Ill. 85, the buyer agreed to buy its requirements of anthracite coal of the seller who was to furnish the same as ordered. It was held that the contract was valid although the amount of coal was not fixed, and the contract was wanting in certainty, and did not bind the buyer to require any coal.

In Finch & Co. vs. Zenith Furnace Co., 245 Ill. 586, the contract was that the vendor agreed to sell, and the vendee agreed to buy, estimated tonnage of 50,000 tons, and it was held that this was an agreement for a practically definite amount to be delivered by the vendor which the vendee was bound to take.

In Russell vs. Excelsior Stove Co., 122 Ill. App. 23, it was held that where a party agreed to purchase his requirements of goods, he thereby contracted to purchase what he should need in the regular course of his business and not merely what he might choose to order.

In Allen Automobile Supply Co. vs. Johns-Manville Co., 211 Ill. App. 217, a contract by which the seller of batteries agreed to furnish sufficient of the contract commodity to meet the requirements of the purchaser for a twelve month period, and the purchaser agreed to devote its best efforts in promoting the sale of the batteries, it was held that the contract was not void for want of mutuality.

In Schlitz Brewing Company vs. Travi & Corstorta, 179 Ill. App. 269, there was a contract, whereby the defendant agreed to buy

all the beer used in his saloon from the complainant, who agreed to furnish it at a fixed and certain price, it was held that the contract was valid and binding.

In *Lincoln Mining Co. vs. Board of Education*, 212 Ill. App. 586, on page 591, it was said: "A contract to furnish such coal as may be needed, required, or consumed by acceptor, during a limited time, is binding. Such a contract is to be distinguished from one to furnish such coal as the acceptor might want or desire in his business because he is not bound to want or desire any, and such contract is void for want of mutuality."

In *Chalmers & Williams vs. Bledsoe Co.*, 218 Ill. App. 363, one party agreed to buy and the other agreed to sell all of the former's consumption requirements of coal for a period of two years, and it was held to be valid and mutually binding upon the parties.

In *Armstrong Paint & Varnish Works vs. Continental Can Co.*, 220 Ill. App. 90, the seller agreed to sell, and the buyer agreed to purchase, a minimum of \$2000 worth of tin packages, or more as required by them, which the buyers would need for actual use in their business between certain days, and it was held that the contract should be construed as binding the buyer to purchase, and the seller to deliver, its products to a minimum of \$2000, and that while it did not require the buyer to take in excess of that amount, unless their business requirements necessitated it, it did not permit them, while the contract was in force, to purchase such goods elsewhere, and that by purchasing elsewhere the buyer breached the contract.

In construing contracts courts will endeavor to place themselves in the position of the contracting parties as nearly as may be, considering the circumstances under which the contract was executed, and the previous dealings between the parties, and if there are doubtful terms upon which the parties have, by their conduct, placed a practical construction, the court will adopt such construction so placed. *Gillett vs. Teel*, 272 Ill. 106; *Goodwillie Co. vs. Commonwealth Electric Co.*, 241 Ill. 42; *McLain Co. Coal Co. vs. City*

of Bloomington, 234 Ill. 90; Consolidated Coal Co. vs. Jones & Adams Co., 232 Ill. 326; Purcell vs. Sage, 200 Ill. 342.

In National Furnace Co. vs. Keystone Mfg. Co., 110 Ill. 427, on page 433, the court said: "It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron, but, on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of contract. It was bound by the contract to take of appellant at the price named, its entire supply of iron for the year, - that is, such a quantity of iron, in view of the situation and business of appellee as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual."

In Peterson vs. Timken Roller Bearing Co., 233 Ill. App. 54, the buyer agreed not to purchase on the open market, or otherwise, any goods of the quality mentioned in the contract until the quantity mentioned in the contract was accepted from the seller, and he agreed not to resell any oil without the consent of the seller. The contract required ten days prior notice from the buyer to the seller in the event the buyer's plant would not consume the monthly minimum specified in the contract, all of which were held to amount to a contract for the buyer's needs or requirements. On page 60, the court said: "The contract should be construed with due regard to the surrounding circumstances, the nature of the subject matter, the

osition of the parties, and the apparent and known purposes for which the contract was made so that the language may be understood in the sense intended by the parties."

In *Plumb vs. Campbell*, 129 Ill. on page 101, the contract was only signed by one of the parties and there was no agreement on behalf of the other party to do anything under the contract and suit was brought for breach of the contract. On page 106, the court laid down the following rule which we think is applicable to the facts in this case: "The contention of appellant is, that for want of an agreement on the part of appellee to do anything on his part, as shown by the writing, there is want of that mutuality which is necessary to every complete contract. A promise for a promise is not a good consideration, unless there is mutuality, so that each party may hold the other to the performance of his engagements. It does not follow, however, that a contract in writing, to be complete, must show such mutuality on its face. There is a seeming want of mutuality in many cases of contract which may be enforced by the parties on the same proof as would have been necessary had that mutuality fully appeared,--as where one promises to see another paid if he will sell goods to a third person, or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand or suspend legal proceedings or the like. (1 Parsons on Contracts, Sec. 450.) In commenting on this class of cases the author says: "Here it is said that the party making the promise is bound, while the other is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee, within a reasonable time, engages to do, or else does, or begins to do, the thing which is the condition of the first promise. Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality and therefore no consideration for it. But after an engagement on the part of the promisee, which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of

obligation." * * * A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee. (Citing cases) These contracts are called unilateral contracts. proof of assent is not necessary on the part of the promisee. It is sufficient if the required act be performed by him. Hare on Contracts, 304. On the authorities, it is clear that the appellant could be bound, under the writing, in either of three ways: First by appellee engaging, within a reasonable time, to perform the contract on his part; second by beginning such performance in a way which would bind him to complete it; and third by actual performance.

In Cortelyou vs. Barnsdall, 236 Ill. 138, an oil and gas lease did not bind the lessee, and it was held that it could be revoked at any time before the lessee had by some act done after the signing of the agreement, accepted or bound himself to exercise the option granted by the writing.

In Miller vs. Moffat, 163 Ill. App. 1, there was a contract for mining coal, but the contract did not provide that appellee should mine the coal. If he mined the coal, however, he was to pay a price fixed in the contract. On page 4 it was said: "It is an elementary principle of the law of contract that if one party to a contract is under no obligation to perform at all, the contract is void. A contract to be binding and enforceable must have at its inception absolute mutuality. Chitty on Contracts, 15; Addison on Contracts, Vol. 1, Sec. 18; Bishop on Contracts, Sec. 429; Cortelyou vs. Barnsdall, 236 Ill. 130. A promise for a promise is not a good consideration unless there is mutuality so that each party may hold the other to the performance of his agreement. Plumb vs. Campbell, 129 Ill. 191. * * * Where a party not bound to perform under the terms of a unilateral agreement, within a reasonable time, performs, or begins to do the thing in a way which binds him to complete it, this supplies the want of mutuality, and is a sufficient consideration to support the promise of the other party." See also Corbett vs. Cronkhite, 239 Ill. 9.

When we apply the rules announced in the above cases to the facts now before us we conclude that the contract was mutual and binding. Appellant was a large manufacturer of ice cream and was also a retail dealer in ice. In its business it used a large quantity of ice. It had purchased ice of appellee prior to the date of the contract in question. The contract was entered into for the purpose of supplying appellant with ice up to the amount specified in the contract for a period of three years. The presumption was that the appellant would continue to want ice during the period specified in the contract, and that it would not go out of business during that time. The evidence shows that it did not go out of business, but continued in business until after the expiration of the contract. Appellant agreed neither to use nor sell ice obtained from any other source until after appellant had purchased the full tonnage set aside and reserved for him by appellee as provided in the contract. We think the facts in this case do not fall within the rule announced in Higbie vs. Rust, supra, that appellant only contracted for such ice as it might want, wish, desire, or choose to order, but the facts fall within the rules announced in the other cases cited, to the effect that if the contract was binding at all, it bound the appellant to do exactly what the contract said he shall do, namely, not to sell ice obtained from any other source until after appellant had purchased the full tonnage set aside and reserved for him as provided in the contract. If appellant had gone out of business after the contract was executed and before it had been put in operation, and had not sold nor used ice during the period covered by the contract, there could be no damages recovered because appellant only agreed not to sell or use ice obtained from other sources until after he had purchased the full tonnage provided for in the contract. As long as the contract was merely executory there could be no damages. But appellant did not see fit to permit the contract to remain executory. It entered upon the performance of the contract. It bought under the contract the first year's supply of ice, and the major portion of the

supply for the second year. It continued in business and used and sold ice until the end of the time specified in the contract and in greater quantities than those therein specified. Appellant by its acts in taking ice, at regular intervals, for a period of over fifteen months, in all respects as provided in the contract, recognized the validity of the contract, and is bound by the interpretation it placed upon it. If it be conceded that the contract, in the first instance, was not binding because it lacked mutuality, yet after it was partly carried out by appellant, such part performance remedied the defect of lack of mutuality, and appellant became bound, and was in the same position it would have been in if it had agreed in the original contract to buy the ice. We are also of the opinion that the amount of ice required was not indefinite and uncertain; that this was one entire contract for a period of three years; that it cannot be construed as a contract for separate years which, in case of breaches, would require separate suits. If appellant, before the suit was commenced repudiated the contract and refused to take any more ice, such repudiation entitled appellee to begin suit at once and recover all damages sustained by reason of such breach. *Chicago Washed Coal Co. vs. Whitsett*, 278 Ill. 623; *Lake Shore and Michigan Southern Ry. Co. vs. Richards*, 152 Ill. 59; *Mt. Hope Cemetery Association vs. Weidemann*, 139 Ill. 67; *City of Elgin vs. Joslyn*, 136 Ill. 525.

Appellant insists that there was no breach of the contract upon its part; and if there was a breach it was waived by appellee. The evidence with reference to a breach consists of letters between the parties and oral testimony. The question as to whether there was a breach was one of fact for the jury. The first instruction given on behalf of appellee told the jury to find the issues for appellee, and that the only question for the jury to determine was the question of the amount of the damages. All instructions tendered by appellant on the question as to whether there had been a breach were refused. The only instruction as to the form of a verdict

directed the jury to find the issues in favor of appellee and assess the damages. Before the argument began the court announced that counsel for appellant would not be permitted to argue to the jury the question of the liability of appellant, and would not be permitted to argue any question except the amount of the damages. In these respects we think the court was in error. The construction of the contract was for the court, but whether the contract had been breached depended upon oral and written evidence and was for the jury, and that question should have been submitted to the jury after proper argument had been made and proper instructions given.

Complaint is made that the jury was improperly instructed as to the measure of damage. Par. 67, Part 5, Chapter 121A, of the Statute on Uniform Sales (Smith's Statute 1925, page 2271) fixes the measure of damages and it will be unnecessary for us to consider the instructions in detail.

On account of the errors indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

abstract

AT A TERM OF THE APPELLATE COURT,

241 I.A. 632

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 1 - 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term, A. D. 1925

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241 I.A. 632

7485

W. H. Shons,

Appellant,

vs.

Appeal from the Circuit
Court of Ogle County.

County of Ogle, Illinois,
and Town of Byron,

Appellees

Jett, J.

This suit was instituted by W. H. Shons, appellant, in the Circuit Court of Ogle County against the county of Ogle, Illinois, and Town of Byron, to recover the balance on a contract entered into between appellant and appellees by which the appellant was to floor and paint a certain bridge across the Rock River at Byron, Illinois,

The contract, among other things, provided: "The work to be done consists of providing and placing a new three inch creosoted wood block floor with a three inch creosoted ship-lap subplank and creosoted ransiling and retaining strips; also clesning all steel work and painting same two coats, including furnishing of all materials, tools, machinery, labor and incidental work, all in accordance with the plan~~s~~ and specifications." The consideration to be paid for the work was \$14,389.00.

The contract was entered into on March 19, 1920. The bridge was painted according to contract and \$2,000.00 was paid. There was some delay in laying the floor of the bridge. It was about the first of November, 1920, when the lumber and timbers were received for the bridge, which were placed in position by the middle of the month. In the early part of December the blocks arrived and appellant started placing them in position on or about the 18th of the month.

The contract provides the quality and quantity of creosote to be used in the timbers and blocks and also provides that an inspector should be sent to the plan~~s~~ where the work was done and if an inspector was not sent that there should be an inspection and test after they arrived at the point where they were to be used. The

341 I.A. 682

Appeal from the Circuit
Court of Ogle County.

Illinois,
County of Byron.

Appellees

This suit was instituted by W. H. Rhoads, appellant, in the

Circuit Court of Ogle County against the county of Ogle, Illinois,

to recover the balance on a contract entered into

between appellant and appellees by which the appellant was to erect

and maintain a certain bridge across the Rock River at Byron,

The contract, among other things, provided: "The work to

consist of providing and placing a new three inch concrete

bridge, including retaining and retaining strips; also cleaning all steel

and painting same two coats, including furnishing of all materials,

labor and incidental work, all in accordance with

plans and specifications." The consideration to be paid for the

work was \$14,322.00.

The contract was entered into on March 19, 1920. The bridge

was completed according to contract and \$2,000.00 was paid. There was

no further payment made. It was about the first

of the month of December, 1920, when the lumber and timbers were received for the

bridge, which were placed in position by the middle of the month. In

early part of December the blocks arrived and appellant started

to place them in position on or about the 18th of the month.

The contract was made by the

county of Ogle, Illinois, and the

bridge was completed on or about

the middle of the month of December,

1920, and the balance of the

contract was not paid.

evidence discloses that the blocks were not inspected at the plant and when they arrived some time in December, following the entering into of the contract, there was some conversation had between the contractor or his agents and the officials of appellees in which the contractor claims he was told to proceed and put in the floor. There had been no test of the blocks made at that time, and subsequently when the officials of appellees went to the bridge some conversation was had relative to there having been no test and the appellant stated that the blocks would be alright for the reason that he had received other blocks from the same place. The officials of appellee took a sample from the various piles of blocks and sent them to the highway department at Springfield, for ~~the~~ a test and on December 27th, 1920, they received a report to the effect that the blocks were not in accordance with the terms of the contract.

Appellees notified appellant that the blocks were not according to the provisions of the contract. At this time appellant had received about \$12,000.00 upon the contract. When all of the work was finally done appellees refused to pay the balance on account of the blocks not being according to the contract and this suit was instituted and a verdict in favor of appellees. Judgment having been rendered on the verdict of the jury appellant prosecuted this appeal. It is first insisted that appellees directed appellant to put the material in the bridge, notwithstanding the fact that there had been no inspection and that by so putting it in the bridge appellees waived their right to insist upon the provisions of the specifications, and that they failed to reject or disapprove and this constituted a waiver.

The contract among other things provides:

SECTION 38. "Upon the completion of the work according to the contract, plans, specifications and agreements as determined thereunder by the Engineer, the said Engineer shall make to the party of the first part a statement setting forth the work done and material furnished by the Contractor, together with the amount due the said Contractor therefor, and shall certify the same in writing under his hand. The obtaining of the certificate of the Engineer as to the work done, and the price thereof, shall be a condition precedent to the right of the Contractor to be paid, the sums due him under the terms of this contract."

as disclosed that the blocks were not inspected at the plant
on they arrived some time in December, following the entering
of the blocks into the building. It was seen the
contractor or his agents and the officials of appellees in which
contractor claims he was told to proceed and put in the floor.
had been no test of the blocks made at that time, and subsequently
the officials of appellees went to the bridge some conversation
and relative to there having been no test and the appellant
that the blocks would be alright for the reason that he had
and other blocks from the same place. The officials of appellees
sample from the various piles of blocks and sent them to the
Department at Springfield for a test and on December 27th,
they received a report to the effect that the blocks were not
satisfactory with the terms of the contract.

Appellees notified appellant that the blocks were not satisfactory
provisions of the contract. At this time appellant had
\$12,000.00 upon the contract. When all of the work
done, one appellee refused to pay the balance on account of
not being according to the contract and this suit was
brought and a verdict in favor of appellees. Judgment having been
entered the verdict of the jury appellant presented this appeal.
Notwithstanding the fact that there had been no inspection
made no putting it in the bridge appellees waived their right

The contract among other things provided:

"Upon the completion of the work according
to the contract, plans, specifications and agreements as before-
mentioned by the Engineer, the said Engineer shall
to the party of the first part a statement setting forth
the work done and material furnished by the Contractor, together
with the said Contractor therefor, and shall
the same in writing under his hand. The obtaining of
the receipt of the Engineer as to the work done, and the
receipt of the Engineer shall be a condition precedent to the right of
the Contractor to be paid, the sums due him under the terms of

SECTION 42. "All insufficient, imperfect or damaged work or material when pointed out at any time to the Contractor by the Engineer, or his authorized assistant, shall be remedied immediately and made good, or removed and rebuilt, or replaced to conform to the plans and specifications; and any omission by the Engineer or his authorized assistant, to disapprove of or reject any such defective work or material during construction shall not be deemed an acceptance of such work or material, nor shall such omission on the part of the Engineer be construed as in any way releasing the Contractor from remedying, replacing or making good any defective work or material so as to make the same conform to the plans and specifications previous to final acceptance.

SECTION 55. "Wherever the word 'Engineer' is used, it is understood to mean the County Superintendent of Highways of the county in which the work is located, or his authorized representative."

SECTION 585. "Plant Inspection may be waived. Should the Chief Highway Engineer notify the creosoting company that plant inspection will be waived on creosoted blocks, then the amount of oil contained therein shall be determined by extraction from blocks selected by the inspector."

SECTION 396. "Requirements of Tests. Should the amount of oil found by the above described test be less than that called for in the specifications, the material will be rejected."

In view of the terms of the contract and of the facts as

disclosed by the record we do not think there is any merit in the alleged waiver as insisted upon by appellant, for the reason that the appellant knew at that time he put the blocks in the bridge they had not been tested and he went ahead and put them in on his own assurance that they were right. As soon as appellees ascertained the blocks were not according to the terms of the contract they notified appellant to that effect and refused to pay him. Appellees were not in possession of the facts of the condition of the blocks at the time they were being put in place and therefore could not waive the defects.

The evidence discloses that certain channel irons were used in the bridge at a cost of \$225.00. There was a dispute as to whether the specifications provided for them or whether they were extras and the question was submitted to the Highway Department at Springfield, and it was decided that they were not in the specifications but were extras. Appellant would have been entitled to pay for these extras if his work had been performed according to contract, but in view of the fact that his work was not performed according to the terms of the contract, he is not entitled to recover anything in addition to what he has already been paid thereon.

Complaint is made that counsel read to the jury certain allegations in the declaration in which it was admitted that the blocks were not according to the contract. This practice has frequently been condemned and should not have been allowed in this case, but we do not think that it was, under the facts, detrimental to the rights of appellant.

The costs of the additional abstract should be charged to the appellant.

After a careful examination of the record in this cause we are of the opinion that the judgment of the Circuit Court of Ogle County should be affirmed, which is accordingly done.

Judgment Affirmed.

but is made that counsel read to the jury certain
in the declaration in which it was admitted that the
to the contract. This practice has frequently

of the additional statement should be changed to

Verdict Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 1st day of
april in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court.

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 632

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 1 - 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

October Term A. D. 1925

7528

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The People of the State of Illinois,

Defendant in Error,

Writ of Error to the
County Court of
Kankakee County.

vs.

James McClary.

241 I.A. 632

Plaintiff In Error

Jett, J.

This is a prosecution against James McClary, plaintiff in error in which he is charged with the violation of Section 21 of the Illinois Prohibition Act.

The information filed by the states attorney of Kankakee county consists of six counts. The second count of which is as follows: "That the defendant James McClary on the 21st day of December, 1924, did then and there unlawfully, wilfully and knowingly in violation of Section 21 of the Illinois Prohibition Act, maintain ~~an~~ a common nuisance, in that he did unlawfully, wilfully and knowingly in the building located at 139 East Station Street, in the City of Kankakee, Kankakee county, Illinois keep intoxicating liquor for beverage purposes, to-wit, whiskey, without having a permit from the Attorney General." The 1st, 3rd, 4th, 5th, and 6th counts are very similar to the second count and differ only in the fact that the section of the statute alleged to have been violated is mentioned in the second count and not in the 1st, 3rd, 4th, 5th and 6th counts and the offense is charged to have been committed on days other than that stated in the second count.

A motion was made to quash the information and in the motion it is stated that the said 1st, 3rd, 4th, 5th and 6th counts are indefinite and uncertain in that they do not identify the offense or under what statute or law the defendant is charged so that he may not be put in jeopardy twice for the same offense. The second reason assigned is that section 21 of the Illinois Prohibition Act is unconstitutional and void. The motion to quash the information was overruled by the court.

People of the State of Illinois,

Writ of Error to the
County Court of
Kankakee County.

Defendant in Error,

vs.

Plaintiff in Error

241 I.A. 632

This is a prosecution against James McGarry, Plaintiff in error, which he is charged with the violation of section 21 of the Illinois Criminal Code.

The information filed by the State Attorney of Kankakee County consists of six counts. The second count of which is as follows: "That the defendant James McGarry on the 21st day of November, 1924, did then and there unlawfully, wilfully and knowingly violate section 21 of the Illinois Criminal Code, maintain a common nuisance, in that he did unlawfully, wilfully and knowingly in the building located at 133 West Station Street, in the City of Kankakee, Kankakee County, Illinois keep intoxicating liquor for purposes, to-wit, whiskey, without having a permit from the Attorney General." The 1st, 3rd, 4th, 5th, and 6th counts are very similar to the second count and differ only in the fact that the violation of the statute alleged to have been violated is mentioned in the second count and not in the 1st, 3rd, 4th, 5th and 6th counts and the offense is charged to have been committed on days other than those stated in the second count.

A motion was made to quash the information and in the motion it is stated that the said 1st, 3rd, 4th, 5th and 6th counts are identical and uncertain in that they do not identify the offense or state it in jeopardy twice for the same offense. The second reason

A jury trial was had and the following verdict was returned:

"We, the jury, find the defendant James McClary guilty in manner and form as charged in the information."

Motions for a new trial and in arrest of judgment were denied and judgment was rendered on the verdict of the jury and the plaintiff in error was sentenced to serve 60 days in the county jail of Kankakee county and to pay a fine in the sum of \$200.00 and costs of prosecution, and this writ of error was sued out by the plaintiff in error.

While a number of errors are assigned the plaintiff in error does not argue any question except the alleged errors in giving on the part of the People the 4th, 7th and 8th instructions. Section 21 of the Illinois Prohibition Act among other things provides:

"Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this Act, or where any mash, still or other property designed for the illegal manufacture of liquor is kept, and all intoxicating liquor, mash, still or other property kept and used in maintaining the same, is hereby declared to be a common nuisance; a single unlawful sale or barter, or a single act of manufacturing liquor unlawfully shall constitute a nuisance as herein defined. And any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500.00 or be imprisoned not more than a year or both."

While the record discloses that a motion was made to quash the information there is no reason assigned for the quashing of the second count nor is any argument presented by the plaintiff in error in support of the motion to quash either or any of the counts. Notwithstanding that fact we are of the opinion that the information charged a violation of the said Section 21 of the Illinois Prohibition Act.

The owners and lessors of a certain hotel building in the City of Kankakee became suspicious that intoxicating liquor was being sold on the premises. Two detectives were employed who went to Kankakee and registered at the hotel. They testified that they purchased liquor on several occasions by the drink from the plaintiff in error and on one occasion purchased a pint of liquor. After an

A jury trial was had and the following verdict was returned:
Y. find the defendant James McGarry guilty in manner and

as charged in the information.

Motions for a new trial and in arrest of judgment were denied.
It was rendered on the verdict of the jury and the plaintiff
error was sentenced to serve 60 days in the county jail at Kansas
city and to pay a fine in the sum of \$300.00 and costs of prosecution.
It is writ of error was sued out by the plaintiff in error.

While a number of errors are assigned the plaintiff in error
does not argue any question except the alleged errors in giving on the
part of the People the 4th, 7th and 8th instructions. Section 21 of
the Prohibition Act among other things provides:

"Every room, house, building, boat, vehicle,
or place where intoxicating liquor is
sold, kept, or bartered in violation
of the Act or where any such other
violation of the Act is committed, shall be
considered a place where intoxicating liquor is
sold, kept, or bartered, and all information
or property kept and used in maintaining
the same shall be deemed to be a common nuisance;
and any person who main-
tains such a common nuisance shall be guilty of a mis-
demeanor, and upon conviction thereof shall be fined
not more than \$500.00 or be imprisoned not more than
six months."

of the motion to quash either on any of the grounds set forth.

They testified that they
by the clerk from the plaintiff
After

examination of the evidence in the case we do not think it can be seriously contended that the evidence does not show beyond reasonable doubt that plaintiff in error is guilty of the charge preferred in the information and that he had intoxicating liquor in the hotel building in question as charged in the information and sold it in violation of the Illinois Prohibition Act.

It is argued that the 8th instruction given on behalf of the plaintiff in error is erroneous. This instruction tells the jury that they are the sole judges of the credibility of the witness and among other things that they may take into consideration any circumstance that tends to shed light upon the credibility of the witness. This instruction was criticized in *People vs Krauser*, 315 Ill. 485-517.

In *People vs. Thompson*, 274 Ill. 214-220, it is held that while the instruction should have been limited to the circumstance shown by the evidence it was inconceivable that this omission, in view of the other instructions given, could have misled the jury to understand they could consider circumstances not appearing in evidence and it was held that the mere giving of such an instruction would not constitute reversible error and we do not think that it does constitute reversible error in this cause when considered in connection with other ~~KEYER~~ instructions given to the jury.

The fourth instruction complained of is in the language of the statute. In *People vs. Beecher*, 154 Ill. App. 229 it was held in a dram shop case not to be error to instruct the jury in the language of the statute.

The 8th instruction complained of given on behalf of the People relates to the testimony of the detectives. It is as follows: "The court instructs the jury, as a matter of law that while you may consider the witness' manner of testifying and his interest or want of interest in the case, yet it is entirely legitimate to employ detectives to run down and ascertain those who violate the law. You are further instructed that when one acts in the capacity of a detective it becomes the duty of the jury to scrutinize the testimony of that person and to say whether or not the testimony of that person so acting is biased, whether the

tion of the evidence in the case we do not think it can be over-
extended that the evidence does not show beyond reasonable
doubt that the defendant in error is guilty of the charge preferred
against him and that he had intoxicating liquor in the hotel
room in question as charged in the information and sold it in
violation of the Illinois Prohibition Act.

It is argued that the 8th instruction given on behalf of
the defendant in error is erroneous. This instruction tells the jury
that they are the sole judges of the credibility of the witness and
other things that they may take into consideration any known
facts that tend to show light upon the credibility of the witness.
The instruction was not erroneous.

The instruction should have been limited to the facts of the
case. The evidence it was inadvisable that this instruction in vi-
olation of the law should be given. The instruction was not
correctly stated in evidence and
on an error in this case
think that it does constitute
error.

In the language of
the court in *People v. Beecher*, 184 Ill. 111. 230 it was held
that it is not error to instruct the jury in the language

The 8th instruction complained of given on behalf of the people
is to the testimony of the detectives. It is as follows: "The
jurors, as a matter of fact that while you may consider
the manner of testifying of the witnesses or want of interest
as, yet it is entirely legitimate to employ detectives to run
ascertain those who violate the law. You are further instructed

interest he serves has influenced him to an extent that would reflect upon or affect his testimony." The instruction may be subject to criticism. It was not detrimental to the interests of plaintiff in error as it was more favorable to him than to the people.

- After considering all of the facts and circumstances in the case together with the instructions given on the part of the People, as well as those on the part of the plaintiff in error, we are of the opinion that the jury was fully informed of the law of the case, and while some of the instructions are subject to criticism, we are not prepared to say that they occasioned any harm to the interests of the plaintiff in error.

We conclude, therefore, that the judgment of the County Court of Kankakee County should be affirmed, which is accordingly done.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 1st day of
April in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

abstract

AT A TERM OF THE APPELLATE COURT

241 I.A. 632

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 3 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The People of the State of Illinois,
ex rel Andrew Russel, etc.,

Appellee,

vs.

Appeal from the Circuit

Court of Will County.

Illinois State Bank of Crete, et al.
On appeal by William Saller,

241 I.A. 632

Appellant

Partlow, J.

This is an appeal by William Saller from an order of the circuit court of Will county allowing a solicitor's fee for services performed for the receiver in the liquidation of the affairs of the Illinois State Bank of Crete.

On November 29, 1919, the bank in question was closed on account of the defalcation of its cashier, and on petition of the Auditor of Public Accounts, a receiver was appointed by the circuit court of Will county. The receiver employed Charles S. Deneen, E. D. Heise, and Roy Massena, as his attorneys to assist in winding up the affairs of the bank. Extensive litigation was entered into, and on June 25, 1921, these solicitors, during term time, filed their sworn petition for the allowance of their fee. The receiver was ordered by the court to give notice of the hearing on the petition to the chairman of the committee of depositors, which notice was given. The hearing on the petition was set for September 14, 1921, which was during vacation. On that date all of the committee of depositors were present except one. The only evidence introduced was that of the three solicitors, and after the evidence was heard, the matter was taken under advisement by the court. On September 28, 1921, which was during term time, an order was entered allowing a fee of \$25,000 to be paid out of the assets of the bank. From that order an appeal has been prosecuted by Saller, who was a stockholder, director, depositor, and creditor of the bank.

The question as to the amount of the fee allowed is not argued by appellant, but he insists that the order allowing the fee is void for the reason that the evidence upon which it was based was

October Term, 1935.

The People of the State of Illinois,
vs. Andrew Russell, etc.,

Appellee,

vs.

Illinois State Bank of Crest, et al.,
Appellant by William Sailer,

Appellant

v. 7.

This is an appeal by William Sailer from an order of the
Illinois State Bank of Crest.
The court of Will County allowing a solicitor's fee for services
rendered for the receiver in the liquidation of the affairs of the

Illinois State Bank of Crest.

On November 22, 1932, the bank in question was closed on
account of the delinquency of its cashier, and on petition of the
Illinois State Bank of Crest, receiver was appointed by the circuit
court of Will County. The receiver employed Charles S. Hansen,
Hansen, and Roy Hansen, as his attorneys to assist in winding up the
affairs of the bank. Extensive litigation was entered into.
In 1931, these solicitors, during term time, filed their account
for the allowance of their fees. The receiver was ordered by
the court to give notice of the hearing on the petition to the chair-

man of the committee of depositors, which notice was given. The
hearing on the petition was set for September 14, 1931, which was
before the court. On that date all of the committee of depositors
were present except one. The only evidence introduced was that of
the receiver, and after the evidence was heard, the matter
was taken under advisement by the court. On September 28, 1931,

an order was entered allowing a fee of
\$100 to be paid out of the assets of the bank. From that order an
appeal has been prosecuted by Sailer, who was a stockholder, attorney,

the fee allowed is not
the order allowing the

Appeal from the Circuit

Court of Will County.

SAILER, A. 683

2.

taken in vacation, and that Section 67, Chapter 37 of the statute defining powers of judges in vacation is not broad enough to authorize such a hearing. This question is argued at considerable length, but we are of the opinion that Section 67, Chapter 37 is not controlling, but that regardless of the evidence taken during vacation, there was sufficient evidence before the chancellor to justify him in entering the order for the fee.

In 24 Cyc. page, 456 it is said: "It is not necessary, in all cases, for the court to hear evidence as to the amount of compensation to be allowed a receiver as counsel fees. It is a matter very largely in the discretion of the trial court, and if the facts are such that the court feels at liberty to act without the assistance of such evidence it may do so." Citing Welch vs. Renshow, 14 Colo. App. 526; 59 Pac. 967; Hickett vs. Parrot Silver Co., 32 Mont. 145; 79 Pac. 698; Bartholomew vs. Un. Tr. Co., 36 Ind. App. 328; 75 N. E. 31,

In Hutchinson vs. Hutchinson, 105 Ill. App. 349, a decree allowing a solicitor's fee was affirmed, and the only evidence upon which the fee was based consisted of affidavits filed by the respective parties. On page 351 the court said:- "that he (the chancellor) should not have been controlled entirely by the affidavits of the several solicitors in support of the motion. The chancellor had the right to consider his experience, and this court in reviewing the order may consider its experience in such matters in arriving at a conclusion as to what was a usual and customary as well as reasonable allowance for the fee in question."

In Goodwillie vs. Milliman, 56 Ill. 523, on page 528, the court said: "In taxing such fees the chancellor should exercise his own judgment, and not be wholly governed by the opinion of attorneys as to the value of their services. He has the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, and he should exercise that judgment. He should, no doubt, consider the opinions of witnesses and evidence of the sum usually charged and paid for such services, but should not be wholly controlled

3.

by the opinion of attorneys as to their value."

In *McMannomy vs. Chicago-Danville & Vincennes Railroad Company*, 167 Ill. 497, on page 510, the court said: "While opinions are receivable and entitled to due weight, the courts are also well qualified to form an independent judgment on such questions, and it is their duty to do so."

In *People vs. Gilbert*, 263 Ill. 85, on page 91, the court said: "The courts are not bound by opinions of attorneys concerning what is a reasonable charge for legal services, but are responsible to litigents for the use of their own knowledge of the value of such service, and ought to, and will, take into consideration such knowledge."

To the same effect is *Gentleman vs. Sanitary District*, 260 Ill. 317.

The original bill in this case for the appointment of the receiver was filed by the Auditor of Public Accounts through the Attorney General. Appellant was a party defendant to that bill and submitted himself to the jurisdiction of the court for all purposes. *Staunton Coal Co. vs. Menk*, 197 Ill. 369; *Sterling National Bank vs. Martin*, 213 Ill. App. 566; *Bonney vs. McClelland*, 235 Ill. 259. At the time the petition for the allowance of solicitor's fees was filed, the court had jurisdiction of both the subject matter and the person of appellant. The petition for solicitor's fees was filed during term time, and had attached to it the affidavit of the three solicitors, stating in great detail, the number of days and hours they were employed, and the character of the services for which they were seeking compensation. It is apparent from these affidavits that the services performed were very extensive and consumed days, weeks and months of the time of the three solicitors to the exclusion of about all other business. The affairs of the bank were in a chaotic condition, and the solicitors devoted their time to the unravelling of the tangles. The services consisted in the settlement of disputed claims, the examination of witnesses, the beginning of

... to form an independent judgment on such questions, ... duty to do so."

The People vs. Gilbert, 223 Ill. 88, on page 10.

... of attorneys ... but are responsible ... for the use of their own knowledge of the value of each ... take into account ...

... Statistics, 280

4.

suits, the filing of pleadings, the argument of motions, the trial of cases some of which involved amounts extending into the hundreds of thousands of dollars. When the petition for the allowance of solicitor's fees was filed the court, during term time, ordered notice to be given to this committee of depositors including appellant. Notwithstanding the fact that notice was given, no answer was filed to the petition, and no defense was made. No evidence, either oral, or by affidavit, was offered, or attempted to be offered by appellant. The evidence taken in vacation was substantially the same as that contained in the affidavits accompanying the petition, only it was in greater detail and included the estimated value of the services rendered. The chancellor before whom the petition was filed in term time, and before whom the evidence was taken in vacation, had entered many of the orders in the proceedings and was doubtless familiar with the amount and nature of the work done by the solicitors. The order of allowance of the fee was made in term time. The chancellor had the requisite experience and knowledge to form an opinion as to the value of these services, and this, taken in connection with the uncontradicted affidavit of the solicitors, formed a sufficient basis for the allowance of the fee, even though the evidence taken in vacation should be excluded on the grounds contended for by appellant.

Section 11 of the Banking Act, among other things, provides that "no bill shall be filed, or proceeding commenced, in any court for the dissolution or winding up of the affairs, or for the appointment of a receiver for any such banking corporation on the grounds of insolvency or impairment of the capital stock of such banking corporation, or upon the grounds that such bank is being conducted in an illegal, fraudulent, or unsafe manner, except in the name and by the authority of the Auditor of Public Accounts represented by the Attorney General." It is claimed by appellant that under this section the State has voluntarily assumed the relation of quasi trustee, or guardian, of the interests of the depositors in a defunct bank; that it is the duty of the Auditor, represented by the Attorney General, to

of motions, the trial of

a some of which involved amounts extending into the hundreds of
hundreds of dollars. When the petition for the allowance of appellant's

was filed the court, during term time, ordered notice to be given
to this committee of depositors included

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oral, or by affidavit, was

The evidence taken

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or unsafe manner, except in the name and by the

voluntarily assumed the relation of grant trustee, or

interest of the depositors in a solvent bank; that

5.

have the receiver appointed, to sequester the funds, and wind up the affairs of the bank; that the Attorney General has charge of the litigation, and that solicitor's fees can only be allowed upon his petition; that the petitioners in this case were not employed by the Attorney General and hence are not entitled to fees.

No Illinois case is cited in support of this contention and we do not ~~think~~ it can be sustained. Section 11 of the Banking Act is quite lengthy and covers various features of banking. It provides two methods of appointing receivers, one by the Auditor of Public Accounts, and the other on application of the Auditor to some court. Even where the appointment is made by the Auditor, the section provides that all expenses of the receiver, including solicitor and attorney's fees shall be paid out of the assets of the bank upon the approval of the Auditor. This provision authorizes the employment of attorneys and the allowance of fees to attorneys employed by the receiver to be paid out of the assets of the bank. The receiver in the case at bar was not appointed by the Auditor, but was appointed by the circuit court of Will county. We think the purpose of that part of Section 11, first above quoted, was to prevent any dissatisfied creditor from filing a bill to appoint a receiver, and for that reason placed the duty upon the Auditor of Public Accounts, but after the Auditor applies to the court, and a receiver is appointed, the court acquires jurisdiction for all purposes, and the court will do full and complete justice between all of the parties, and determine all of their rights. *Wehrheim vs. Smith*, 226 Ill. 346. After the receiver is appointed, he is an officer of the court, and his possession of the assets of the bank is the possession of the court. He is subject to the orders of the court, and if the court, in its discretion, authorized him to employ counsel to wind up the affairs of the bank, he has a right to do so, and the counsel so employed has a right to be paid. *Mulcahey vs. Strauss*, 151 Ill. 70. Under the facts presented in this case it would be almost impossible for the Attorney General to be the attorney for the receiver. It was not the duty of the

the receiver appointed to administer the funds, and wind up the

affairs of the bank, and the receiver shall have the right to

employ such persons as he may deem necessary for the purpose of

conducting the business of the bank, and the receiver shall have

the right to sue and be sued, and to defend himself in any

suit or action, and the receiver shall have the right to

make such contracts as he may deem necessary for the purpose of

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6.

Attorney General, as a public officer, to pay out of public funds, fees incident to such employment. The defunct institution must bear the expenses which are necessary for the employment of attorneys to close up its affairs, and the receiver had the right, under the ^{super} provision of the court, to employ such solicitors, and they were entitled to pay for their services.

The petitioners, through the receiver, brought suit against the directors of the bank to recover losses claimed to have been caused by the negligence of the directors, which suit resulted in extensive litigation. Appellant contends that in all that petitioners did, they were mere volunteers; that the receiver had no right to bring suit against the directors; that there was no order of court authorizing such suit; that the services of the petitioners were useless, and legally worthless; and that petitioners cannot recover in this case.

The order appointing the receiver authorizes him to convert the assets of the bank into money, pay upon order of the court the expenses of the administration of the property, together with compensation to himself, including his own costs, expenses and solicitors' fees, and to distribute the balance among the creditors according to their respective rights as the same might be made to appear to the court. Another order provided that the receiver "shall have all the usual powers granted in such cases for the proper administration of such receivership, with full power and authority to institute and prosecute, in his own name as such receiver, all suits and proceedings either in law or in equity as he may deem necessary, proper, or advisable for the collection of all moneys, claims, or property now due, or which may become due to said Illinois State Bank."

In 34 Cyc. 290, it is said: "The general rule is that where a receiver is charged with duties and the performance of a particular trust requiring the benefit of counsel to guide and assist him, he is entitled to the benefit of such assistance, and he will be allowed, out of the fund, reasonable and proper fees in this behalf, and

General, as a public officer, to pay out of public funds
as incident to such employment. The defendant institution must bear
the expenses which are necessary for the employment of attorneys to
lose up its affairs, and the receiver had the right, under the
vision of the court, to employ such solicitors, and they were

The petitioners, through the receiver, brought suit against
the directors of the bank to recover losses claimed to have been
caused by the negligence of the directors, which suit resulted in
a judgment against the directors. Appellant contends that in all that petitioners
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"The general rule is that where
is charged with duties and the performance of a particular
the benefit of counsel to guide and assist him, he

although there is no specific original order giving the receiver authority to employ counsel, counsel fees are nevertheless within the just allowances that may be made by the court."

In Niblach vs. Munday, 218 Ill. App. 385, on page 392, the court said: "It is further argued that the orders entered by the circuit court in which the receiver was appointed, did not direct him to institute this suit against the directors, and that the receiver can only bring such suits as he is authorized to do, and there being no authority for the bringing of this suit, the bill was properly dismissed. It is true that the order authorized the receiver to bring such suits as he may deem advisable for the collection of money, and while the case of Simmons vs. Taylor, 106 Tenn. 729, holds that the absence of an allegation that the receiver has been authorized to institute the suits may be taken advantage of by demurrer, we think it is not necessary, in every case, to have an order specifically authorizing the bringing of a particular suit. It is sufficient if the receiver be authorized generally. At least we hold in this case that if the receiver is improvidently prosecuting this suit, the matter can be brought to the attention of the court appointing him. And that the order of the circuit court is not void."

In Chicago, Title & Trust Co. vs. Munday, 297 Ill. 555, it was held that where an order of court appointing a receiver of an insolvent bank authorizes him to institute and prosecute, in the name of the bank or in his own name as such receiver, any and all suits at law and in equity which he deems necessary or advisable for the collection of moneys due or to become due to the bank, or for the recovery of property belonging to the bank, the receiver has authority to file a bill against the directors of the bank charging them with losses in allowing mismanagement and misapplication of the funds.

Under the order of the circuit court appointing the receiver, he was invested with power to bring whatever suits were necessary to collect the assets of the bank, and in so doing he had the right to bring suit against the directors if necessary and to employ such counsel as was necessary to aid him. We do not think there is any

if there is no specific original order giving the receiver
authority to employ counsel, counsel fees are nevertheless within
the allowance that may be made by the court."

In *Witbeck vs. Hunsley*, 218 Ill. App. 322, on page 323, the
court said: "It is further argued that the order entered by the
court in which the receiver was appointed, did not direct him
to file this suit against the directors, and that the receiver
is bringing such suits as he is authorized to do, and there being
no authority for the bringing of this suit, the bill was properly
dismissed. It is true that the order authorized the receiver to bring
such suits as he may deem advisable for the collection of money, and
the case of *St. Louis & Taylor*, 106 Tenn. 729, holds that the
bringing of an allegation that the receiver has been authorized to
bring such suits may be taken advantage of by defendant, we think
necessarily, in every case, to have an order specifically
authorizing the bringing of a particular suit. It is not
authorized generally. At least we hold in this case
that the receiver is imprudently presenting this suit, the matter
being to the attention of the court appointing him. And that
of the circuit court is not void."
Chicago, *Little & Ernst* vs. *Monday*, 237 Ill. 324, is
a case that shows an order of court appointing a receiver of an
bank authorized him to institute and prosecute, in the name
of or in his own name as such receiver, any and all suits
or equity which he deems necessary or advisable for the
collection of money due or to become due to the bank, or for the
protection of property belonging to the bank. The receiver has authority
to file against the directors of the bank charging them with
mismanagement and misapplication of the funds.
The order of the circuit court appointing the receiver
with power to bring whatever suits were necessary to
the bank, and in so doing he had the right to

3.

question but that the three solicitors in this case were not mere volunteers, but they were employed by the receiver in the performance of his duties. It is apparent from the affidavits attached to the petition that their services were of such magnitude that they were practically prevented from engaging in any other business for a considerable length of time. They were not mere volunteers, their services were valuable to the receiver, and they were entitled to compensation therefor.

We find no reversible error and the order will be affirmed.

Order affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. 3rd day of
april in the year of our Lord one thousand
nine hundred and twenty- six.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of

October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 633

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1925

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

August Lang, Administrator
of the Estate of Ellen Lang,
Deceased,

Defendant in Error,

Error from the County
Court of DeWitt
County.

Therese Weich, Mary Hilkin,
Mary Lang, August Lang, Eliza
Lowrey and Cecelia Lang,
Plaintiffs in Error.

241 I.A. 683

One branch of this case was previously before this court on appeal in Lang, Gen. No. 7384, and an opinion was filed March 1, 1935. That case arose upon a petition for the sale of real estate by debt filed in the County Court of DeWitt County, and was decided in favor of the plaintiff. One item of this claim was \$1000 for care and nursing of decedent during her last illness. The item of \$1000 was disallowed, and the item of \$1000 was disallowed. Upon plaintiff in error here appealed to the circuit court from the judgment of the probate court in disallowing said item of \$1000. The appeal was dismissed by the circuit court for want of jurisdiction. From the judgment of the circuit court she appealed to this court and the judgment of the circuit court was affirmed. In that case this court held that the appeal to the circuit court was no from the judgment disallowing the \$1000 claim of appellant and was from the decree of sale and that the circuit court had no jurisdiction to review the judgment of the probate court.

2.

objection to the claim was interposed orally. It is claimed by plaintiff in error that the court could only hear objections upon a written answer and issue formed as in chancery. Sec. 101 of the Administration Act provides, "Such application shall be docketed as other causes, and the petition may be amended, heard or continued as other causes, and the practice in such cases shall be the same as in cases in chancery." In the record it is recited that on the hearing of the objections to the claim, "testimony was heard for and against the claim; that on the completion of the evidence the court heard arguments of counsel of both the claimant and the objectors; and the court being fully advised in the matter, doth find that it has jurisdiction of both the subject matter and the parties," etc. It appears from the record that the parties went to trial under the impression that no formal answer was necessary. No rule on the objectors to answer the petition, or motion to default them for want of an answer was entered. No step whatever was taken to have an issue joined by written pleadings, and plaintiff in error participated in the trial, ~~making~~ both by way of introducing testimony and in the argument of counsel. The decree recites that Cecelia Lang and certain other named defendants "each being present in court at the hearing hereof, and each in open court entered their appearance in person and consented to the hearing of said petition by the court at once." Under these circumstances the parties will be regarded as having waived the formality of an answer, and the case will be treated the same as though an answer had been filed. It has been repeatedly held and is well settled that parties going to trial willingly, without formal issues made up, will be considered as having waived the required formality to make up an issue. (Jackson et al v. Sackett, et al, 146 Ill. 646 p. 655; Devine v. Chicago City Ry. Co. 237 Ill. 278.)

Plaintiff in error urges that there was no certificate of evidence preserved and no recital of evidentiary facts in the decree of the trial court disallowing her claim, hence, the *prima facie*

objection to the claim was interposed orally. It is claimed by
plaintiff in error that the court could only hear objections upon a
written answer and issue framed as in chambers. Sec. 101 of the
Evidence Act provides, "Each application shall be booked
and the court, or the judge, may be amended, heard or continued
and the practice in such cases shall be the same
as in the case of a writ." In the record it is recited that
"testimony was heard for and
the claim; that on the completion of the evidence the court
heard arguments of counsel of both the claimant and the objector;
and the court being fully advised in the matter, both that it
was a question of both the subject matter and the parties," etc.
to try I under the
its rule on the
or motion to default them for
lawyer was
in error by
in the trial, having both by way of introducing testimony
the argument of counsel. The issues tested that results
present in
I be treated the same as though an answer had been filed.
held and is well settled that parties going
will be considered
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no relief of evidentiary facts in
the evidence.

3.

case made by its prior allowance has not been overcome. Village of Herlem v. Suburban R.R. Co. 202 Ill. 301 is cited in support of this contention. That case is not applicable to the facts in this case. In that case the decree merely found that the court had jurisdiction and that all the material allegations in the bill of complaint were proved. In the instant case the decree recites the hearing of evidence, finds that the items comprising \$388.48 of plaintiff in error's claim were proper charges against the real estate and what each item was for, and finds that the ~~item~~ of \$1000 for nursing and care of deceased for five years prior to her death is not a proper charge against the real estate. The case cited by plaintiff in error quotes with approval from Jackson et al v. Sackett, et al, supra, as follows: "Where evidence is taken orally in open court it must be preserved by a certificate of evidence, but where the decree recites the facts found by the court from the evidence, it will be presumed, in the absence of anything in the record showing the contrary, that the facts thus found were proved by competent evidence." It is well settled that where there is no bill of exceptions, or certificate of evidence, it will be presumed that there was evidence to sustain the findings of the court. (Hurlbut v. Talbot 273 Ill. 356 p. 361.) The judgment against the administrator is only prima facie evidence, as against the heir, and is open to investigation upon application for an order to sell the land of the heir for its payment. (Goeppner, et al v. Leitzelmann 98 Ill. 409; Atherton v. Hughes 249 Ill. 326.) The prevailing practice in this state relative to the allowance and rejection of claims is largely informal. (Johnson v. Gillett 52 Ill. 358; Tenk v. Lock 26 Ill. App. 218.) We find no reversible error in the record and the decree of the county court will be affirmed.

Publication notice was given to non-residents upon the suing out of the writ of error herein, and a motion has been made by plaintiff in error to tax the costs of such publication against the losing party. The motion is allowed and the costs are ordered to be taxed against plaintiff in error.

Decree Affirmed.

...the prior allowance has not been overruled.
...v. ... Co. 202 Ill. 301 is cited in support of this
... That case is not applicable to the facts in this case.
... that case the decree merely found that the court had jurisdiction
... at all the material allegations in the bill of complaint were
... In the instant case
... finds that the items comprising \$388.48 of plaintiff in
... were proper charges against the real estate and what
... of 1000 for nursing
... and finds that the
... of deceased for five years prior to her death is not a
... charge against the real estate. The case cited by plaintiff
... with approval from Jackson et al

... it will be presumed that there was
... (Hartout et al)

... as against the heir, and is open to investigation
... for an order to sell the land of the heir for the
... et al v. ... 202 Ill. 409; ...
... The prevailing practice in this state
... is largely
... 202 Ill. 353; ...

... as given to non-residents upon the entry
... costs of such publication against the

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. *9th* day of
— *april* in the year of our Lord one thousand
nine hundred and twenty— *six*.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 633

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 5 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Moe S. Robinson,
Appellee,

vs.

Appeal from Circuit
Court of Will County.

American General Insurance Co., an Illinois Corporation,
Appellant.

241 I.A. 633

Jones P.J.

This is an appeal from a judgment of the circuit court of Will County in an action by appellee against appellant on two insurance policies issued by appellant, one dated August 6, 1923, for \$4000, covering appellee's stock of merchandise, and the other for \$2000 issued October 10, 1922, covering his building in Joliet where the merchandise was located. The stock and building were also insured in nine other companies; the total insurance on the stock being \$20,000 and on the building, \$14,000.

On May 2, 1923, a fire occurred in appellee's building, partly destroying it and the stock of merchandise. Due notice of loss was given by appellee to appellant through its local agent who wrote the insurance. On May 3rd, H. J. Woessner, secretary of appellant company, wrote its local agent as follows: "We are in receipt of advice from you of loss under our policies 4457 and 4466. M.S. Robinson, and wish to advise you we have referred same to the Underwriter's Adjustment Company, who, we understand, represents the larger number of companies interested. Upon receipt of proofs shall be pleased to forward loss draft to your good office." A representative of the Underwriter's Adjustment Company fixed the value of the stock at \$29,046.90, with a loss of \$18,173.35; and fixed the value of the building at \$14,000 with a loss of \$2,034.43. He pro rated the loss among the various companies according to their respective liabilities under the several policies. Appellant's share of the loss on building was fixed in the adjustment at \$312.99, and on the stock at \$3,643.86. Proofs of loss in accordance with the adjustment were executed by appellee and filed with appellant on May 22, 1923. All

James E. J.

Appellant.

Western General Insurance Co., an Illinois Corporation,

vs.

Appellee,

James E. Robinson,

Appel from Circuit Court of Will County.

241 I.A. 683

This is an appeal from a judgment of the circuit court of Will County in the above captioned cause, rendered on the 10th day of August, 1932, and dated August 10, 1932.

The insurance policies issued by appellant, one dated August 10, 1932, covering appellee's stock of merchandise, and the other dated October 10, 1932, covering his building in Joliet, Illinois, were the merchandise was located. The stock and building were insured in nine other companies; the total insurance on the stock being \$20,000 and on the building, \$14,000.

On May 2, 1932, a fire occurred in appellee's building, completely destroying it and the stock of merchandise. Due notice of loss was given by appellee to appellant through its local agent who wrote the insurance. On May 8th, H. J. Woessner, secretary of appellant company, wrote its local agent as follows: "We are in receipt of advice from you of loss under our policies 4437 and 4466. J. E. Robinson, and wish to advise you we have referred same to the Underwriter's Adjustment Company, who, we understand, represents the number of companies interested. Upon receipt of reports shall be pleased to forward loss draft to your good office." A representative of the Underwriter's Adjustment Company fixed the value of the stock at \$29,046.90, with a loss of \$18,173.33; and fixed the value of the building at \$14,000 with a loss of \$2,034.43. He also stated the loss among the various companies according to their respective liabilities under the several policies. Appellant's share of the loss was \$2,034.43.

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companies interested, except appellant, paid the several amounts apportioned to them by the adjustment. Appellant refused to pay and this suit was brought. The declaration consisted of three counts, the first of which was based on the policy covering the stock, the second count on the policy covering the building, and the third count consisted of the consolidated common counts. To the declaration appellant filed the general issue, and four special pleas. The first averred that it did not authorize the Underwriter's Adjustment Company to represent it in the adjustment. The substance of the other three is that appellee made false statements as to the amount of the loss, and thereby rendered the policies void, and that the aggregate amount paid by the other insurance companies exceeded the actual loss of appellee and therefore there could be no recovery against appellant. A trial was had before a jury resulting in a verdict for appellee for \$4,204.27, being the total sum apportioned against appellant by the adjuster, together with interest from sixty days after the fire. Judgment was entered on the verdict, and this appeal followed.

The first ground of reversal relied upon by appellant is that the verdict is against the weight of the evidence, as to the value of appellee's stock of merchandise; and it is argued that the evidence shows that at the time of the fire the stock was worth less than the \$14,538.67 received by appellee from the other companies. There appears to be no controversy as to appellant's liability on the policy covering the building. The evidence shows that appellee, in a settlement with his creditors other than banks in August 1921 took over a stock of goods valued by them at \$28,000 or \$28,500. He testified that it was worth \$40,000 to \$45,000. He further testified that his profits on sales were from 20% to 30%. Between the time of his settlement with his creditors and the date of the fire, he purchased additional merchandise to the amount of \$24,920. The actual cost of the stock was therefore \$52,920. He claims, and it is uncontradicted, that his sales and expenses in that time were

...the appellant, except appellant, paid the several amounts
...to them by the adjustment. Appellant refused to pay and
...The decision consisted of three counts, the second
...which was based on the policy covering the second, the second
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...companies exceeded the actual loss of appellee and there-
...there could be no recovery against appellant. A trial was had
...resulting in a verdict for appellee for \$4,104.87.
...the total sum appraised against appellant by the auditor,
...interest from sixty days after the fire. Judgment was
...on the verdict, and this appeal followed.

The first ground of reversal relied upon by appellant is
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...it was worth \$40,000 to \$48,000. He further testified
...profits on sales were from 20% to 30%. Between the time

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about \$18,000. Deducting that amount from the gross value of the stock, the net value was \$24,920.1. But if the value of the stock taken over in the creditors' settlement approximates the value placed upon it by appellee, then the net value of the stock at the time of the fire was largely in excess of the net value above mentioned. Considering the evidence upon the question it seems to us that the value of the stock as fixed in the adjustment is substantially correct. Appellant introduced no direct testimony as to the value of the stock or the amount of the loss. The president of the appellant company had sworn to an affidavit of meritorious defense in which he stated that the value of the property was not more than \$15,000, and the amount of the loss and damage not more than \$10,000. On his cross-examination he admitted that he had never inspected the building personally but that he took the word of two independent investigators whom he had employed; but neither of them was called as a witness by appellant. Unless the finding of the jury is manifestly against the weight of the evidence, the verdict will not be disturbed by a reviewing court. We are of the opinion that the verdict is not against the weight of the evidence, and that the amount received by appellee from companies other than appellant did not exceed or equal the amount of his loss.

It is further claimed that the trial court erred in refusing to give appellant's offered instruction 15, which reads: "The court instructs the jury that it is a principle of law that if you believe from the evidence, that any witness has wilfully and knowingly sworn falsely to any material element in the case, or that any witness has wilfully and knowingly exaggerated any material fact or circumstance for the purpose of deceiving, misleading or imposing upon the jury, then the jury have a right to reject the entire testimony of such witness, unless corroborated by other evidence which you believe, or by facts and circumstances appearing in the case." We regard this instruction as faulty in three particulars. Similar instructions were condemned on account of the inclusion of words requiring the jury to believe the

... 10,000. Deducing that amount from the gross value of the
... the net value was \$24, ... But if the value of the stock
... in the creditors' settlement approximates the value
... it by appellee, then the net value of the stock at the
... time was largely in excess of the net value above mentioned.
... the evidence upon the question it seems to us that the
... of the stock as fixed in the settlement is substantially
... introduced no direct testimony as to the value of the
... amount of the loss. The president of the appellant
... of meritorious defense

... of the evidence ...
... of the evidence ...
... of the evidence ...
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... of the evidence ...

... verdict will have to distribute
... of the opinion that the verdict
... the evidence, and that the amount received by
... than appellee did not exceed or equal

... is further claimed that the trial court erred in refusing to
... offered instruction 12, which reads: "The court

... in the case, or that
... jury, then

4.

other evidence in C. & A. Ry. Co. v. Kelly 210 Ill. 449; Sedoff v. Chicago City Ry. Co. 124 Ill. App. 609; Koeller v. Schmitz 172 id. 167; Simpson v. Peoria Ry. Co. 179 id. 307; Steiner v. Higgins 210 id. 119. An instruction ~~offer~~ in almost the same language was condemned as requiring the entire testimony to be corroborated in Zoeller v. Schmitz, supra, p. 169. No error was committed in refusing the instruction offered in this case.

Complaint is also made of the refusal to give appellant's offered instruction 18. It is sufficient to say that we do not think the record contains evidence to support it. (Jent v. Old Ben Coal Corporation 222 Ill. App. 380; Johnson v. R.N.A. 253 Ill. 570; 38 Cyc. "Trial" p. 1617.)

It is finally urged that the trial court erred in reopening the case at the close of all the evidence, and permitting defendant in error to introduce further proof as to the value of the goods destroyed. The law seems to be well settled that after a party has closed his evidence, it is a matter of discretion whether the court will permit him to give further testimony, and that the exercise of such discretion is not reviewable. (City of Sandwich v. Dolan 141 Ill. 430; Hartrich v. Hawes 202 id. 334.)

The record in this case justified the judgment.

Judgment Affirmed.

... evidence in G. & A. Ry. Co. v. Kelly 213 Ill. 469; Scholtz v. Chicago City Ry. Co. 184 Ill. App. 609; Scholtz v. Schmitt 178 Ill. 187; Simpson v. George Ry. Co. 179 Ill. 307; Steiner v. Higgins 210

Ill. 119. An instruction ~~offer~~ in almost the same language was

~~offer~~ v. Schmitt, supra, p. 168. No error was committed in refusing

the instruction offered in this case.

Complaint is also made of the refusal to give appellant's

offer instruction 18. It is sufficient to say that we do not

think the record contains evidence to support it. (Jenn. v. 111

and Coal Corporation 232 Ill. App. 280; Johnson v. 111. 213 Ill.

Ill. 181; "Trial" p. 1217.

It is finally urged that the trial court erred in refusing

to close at the close of all the evidence, and permitting defendant

to introduce further proof as to the value of the goods

discretion is not reviewable. (City of Sandwich v. Dolan 141

Ill. 117; Harrison v. Hewes 302 Ill. 334.)

the court in refusing to give the instruction.

Respectfully,
J. M. ...

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 9th day of
April in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

Abet
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 L.A. 633

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
Ark 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Robert A. Thompson,

appellee,

vs.

Appeal from the Circuit Court
of La Salle County.

John Bruch,

appellant,

241 I.A. 633

Jones, P. J.

This is an appeal from a judgment on a verdict in the circuit court of La Salle County in favor of appellee and against appellant for \$1150 in an action to recover damages to his person and automobile, sustained in an automobile collision on August 25, 1920. The declaration consists of four counts but it is only necessary to call attention to the first count. As originally filed, it charged among other things that the defendant was driving south and disregarding his duty, wrongfully carelessly and negligently drove his automobile around the corner of an intersection of public highways where the view was obstructed, at a greater rate of speed than allowed by law, and caused it to collide with the automobile of the plaintiff, which was then moving west and being driven by plaintiff's daughter, and while the plaintiff and the driver of the car of the plaintiff were "in the exercise of care and caution for their safety," etc. Plaintiff obtained leave to amend the first count of the declaration by inserting the word "due" before the word "care" wherever the same appears in that count, and the word was inserted. The defendant then, on leave, filed his plea of the Statute of Limitations to the amended first count, to which plaintiff demurred and the demurrer was sustained.

The collision occurred on the public highway running east and west from Cedar Point to Granville, at a point where a country road known as the Eaton road enters it from the north. The Eaton road extends no farther south but ends at the main highway. The center portion of the main or east and west road was graveled; and north of the gravel there was a dirt road adjoining the gravel with no line of demarcation. The center of the gravel road was about three feet south of the center line of the highway, and there was a ditch on

Appeal from the Circuit Court
of La Salle County.

Appellee

Appellant

241 I.A. 688

This is an appeal from a verdict in the circuit court of La Salle County in favor of appellee and against appellant for \$1150.00. The declaration consists of four counts but it is only necessary to call attention to the first count. As originally filed, it charged among other things that the appellant was driving south and disregarding his duty, wrongfully and negligently drove his automobile around the corner of an intersection of public highways where the view was obstructed, at a rate of speed then allowed by law, and caused it to collide with the automobile of the plaintiff, which was then moving west and being driven by plaintiff's daughter, and while the plaintiff and the driver of the car of the plaintiff were "in the exercise of care and attention for their safety," etc. Plaintiff obtained leave to amend the first count of the declaration by inserting the word "and" before the word "caused" wherever the same appears in that count, and the word "and" was inserted. The defendant then, on leave, filed his plea of the plea of limitation and to the amended first count, to which plaintiff and the defendant were sustained.

The collision occurred on the public highway running east and west from Cedar Point to Granville, at a point where a country road enters the main road from the north. The main road is a center

the south side of the gravel road. On the north side of the road there was no ditch, but the road had been graded and the dirt road extended to the grass plot next to the fence on the north side of the road. Between the dirt road and the fence on the north the grass plot was twenty to twenty-two feet wide. The Eaton road had not been improved, and where it entered the east and west road there was a "V" or triangular shaped piece of ground caused by the path of the Eaton road diverging east and west with the main road. The base of the triangle was toward the south of the main road and the apex was at the north, so that one path from the Eaton road curved around the corner to the east, and one around the other corner to the west. The "V" was of such elevation, especially on the south side, that travel across it was impracticable. The Eaton road curving around the corner to the east had a beaten path at least fourteen feet wide, and between the beaten path and the fence up to the corner there was a grass plot five or six feet wide with a level surface so that a car could drive over it. At the time of the accident there was a high hedge fence along the north side of the east and west road extending east from the corner of the Eaton road, and another high hedge fence on the east side of the Eaton road extending north from the corner. Inside the field enclosed by these two fences there was growing corn seven or eight feet high. The evidence is that it was a "blind" corner, and it appears there was no opportunity for one approaching the corner on either road to see a car approaching on the other road. On the evening of the accident appellee and his wife, with their two sons, aged respectively twelve and twenty years, and their daughter, twenty-six years old, were driving west along the east and west road toward Granville in an Overland touring car belonging to appellee. His daughter was driving and the older son was in the seat with her on her right. The others occupied the rear seat, appellee on the left side. Appellant was driving a Paige car accompanied by his wife and six children. They had been at the Eaton home about six hundred feet north of this road intersection

On the north side of the road.

extended to the grass plot next to the fence on the north side of the road. Between the dirt road and the fence on the north side of the road was twenty to twenty-two feet wide. The Baton road had

the spot was at the north, so that one path from the Baton road curved around the corner to the east, and one around the other corner to the west. The "V" was of such elevation, especially on the north side, that travel across it was impracticable. The Baton road curving around

was a grass plot five or six feet wide with a level surface so that a car could drive over it. At the time of the accident there was a high ridge across the road, and another high ridge on the east side of the Baton road extending north from the corner.

The field enclosed by these two fences there was growing corn. The evidence is that it was a "blind" corner or right hand turn.

and it appears there was no opportunity for one approaching the corner on either road to see a car approaching on the other road. In fact, it was a blind corner and the driver of the car was not able to see the other car until it was very close.

His daughter was driving and the older son was in the car. The others occupied the rear seat. Appellant was driving a large car. They had been at the

and had driven south into the east and west road, but had returned to the Eaton home for appellant's wife's glasses. Appellant testified they were there possibly three or four minutes, and then drove south again to the intersection, when the collision occurred. At the impact appellee's son who was on the front seat was thrown out between the cars, his face and lip cut, and the occupants of the rear seat were thrown to the floor of the car. Appellee's foot caught under the foot rail and he hung over the left rear door, finally falling to the ground. The front end of appellant's car struck appellee's car toward the rear on the right side, damaging the side of the car, breaking the right hind wheel and puncturing its tube and tire. The cars were otherwise greatly damaged by the force of the collision. The radiator on appellant's car leaked water onto the road and the point where the water spilled was ten feet east of the east line of the north and south road, and thirty feet south of the fence along the north side of the east and west road. The evidence on the part of appellee tends to show that appellant's car was travelling from twenty-five to thirty miles an hour; on the part of appellant it is claimed that he was driving only twenty miles an hour before he came to the intersection and ten miles an hour when he came to the north line of the east and west road. Appellee and his witnesses claim that appellee's car was not exceeding fifteen miles an hour. Appellant claims it was going faster than that. Appellee and some of his witnesses claim that after the accident appellant stated that he had seen their car coming from the east when he was at the intersection the first time but had forgotten about it, and that he also stated that it was all his fault and he would pay all damages. Appellant disputes that he said it was his fault and that he would pay the damages. He admits that he saw a car coming from the east when he was at the intersection the first time, but says it was only about eighty rods east when he saw it. Appellant paid for taxi-hire for taking appellee, his daughter and son to La Salle. There is a sharp conflict in much of the evidence.

Appellant testified

toward the rear on the right side, damaging the side of the car.

However, the right hand wheel and puncturing its tube and tire. The

were otherwise greatly damaged by the force of the collision.

On appellant's car leaked water onto the road and the

the car was ten feet east of the east line of

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He was

to the intersection and ten miles an hour when he came to the north

road and west road. Appellee and his witnesses claim

that appellant's car was not exceeding fifteen miles an hour. Appel-

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A number of reasons are assigned for reversal of this cause. Appellant first urges that it was error for the trial court to sustain the demurrer to the plea of the Statute of Limitations interposed to the amended first count of the declaration. He claims that before amendment, this count failed to state a cause of action, and that the amendment, being made more than two years after the cause of action accrued, subjected the amended count to the Statute of Limitations. The abstract does not correctly set out the language of the first count in this particular. The language used in the count before its amendment was "while plaintiff and those driving the car of plaintiff was in the exercise of care and caution for their safety", etc., and in another place "and that plaintiff there riding, in his said automobile and while exercising care and caution for his safety", etc. Appellant cites *Walters v. City of Ottawa*, 240 Ill. 259, in support of his contention. That case holds that a declaration in an action to recover for injuries received through negligence which does not aver due care on the part of the plaintiff when he was injured and does not contain any averment in regard to his conduct or the circumstances surrounding him from which due care on his part may be reasonably inferred, does not state a cause of action. The same holding is made in *Ross v. C. & A. R. R. Co.* 225 Ill. App. 633. The allegation here is that plaintiff was in the exercise of care and caution. Webster defines "caution" as "To be on one's guard; to be on the watch; a careful attention to probable effects of an act in order that failure or harm may be avoided; prudence in regard to danger; provident care;" and gives as synonyms, "prudence, watchfulness, vigilance". We think the original count defectively stated a cause of action and it would have been sufficient after verdict on motion in arrest of judgment. (*Chicago City Ry. Co. v. Cooney*, 196 Ill. 466.) The demurrer to the plea was properly sustained.

Appellant next complains that appellee's counsel asked leading and improper questions frequently after adverse rulings had been made, and that in numerous instances the court permitted them to be answered, to the prejudice of appellant. While appellee's counsel asked a number of leading questions, the record shows that in most instances

A number of reasons are assigned for reversal of this decree. Appellant first urges that it was error for the trial court to sustain its demurrer to the plea of the statute of limitations interposed to the amended first count of the declaration. He claims that before judgment, this court failed to state a cause of action, and that amendment, being made more than two years after the cause of action accrued, subjected the amended count to the statute of limitations. The abstract does not correctly set out the language of the first count in this particular. The language used in the count before the amendment was "while plaintiff and those driving the car were in the automobile and while exercising care and caution for his safety," Appellant cites *Walters v. City of Ottawa*, 240 Ill. 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

objections to them were sustained, answers to others were stricken on motion, and in some instances appellant's objections were not pressed or motions made to strike the answer. We are of the opinion that no prejudicial error was committed in this regard.

The trial court refused to exclude the evidence and direct a verdict for appellant, and this is assigned as error. Appellant's position is that under the averments of the first count he had the right of way and therefore appellee was guilty of contributory negligence. Sec. 53 of the Motor Vehicle Law provides that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left. It is therefore the duty of the driver of a motor vehicle at an intersection to yield the way to a vehicle approaching from his right, when by the exercise of due care he would or should see that unless he did so yield the way the vehicles might collide. (Partridge vs. Eberstein, 225 Ill. App. 209; Zapf vs. Kutten, 229 Ill. App. 406) A driver must always be in the exercise of due care to observe another car approaching from the right at an intersection and unless he does so he is negligent. It is his duty to have his car under such control that he may allow the other car to pass in front of him. But he is not bound to expect hazards which the law forbids. The right of way does not go to the extent of requiring him to anticipate meeting a vehicle driven at a rate of speed prohibited by law. Appellant knew that appellee's driver had no chance to see him and yet he rushed his car out of a side road and from behind a high hedge fence at such a high rate of speed that a collision was unavoidable.

There is no doubt that appellant had the right of way under the statute, but the law is not intended to be a shield to reckless and indifferent drivers. It is clear from the evidence in this case that the appellant knew the conditions existing at the intersection. He was fully aware that in coming out of the Eaton Road he was likely to meet an automobile on the main road, and that if his speed was excessive he would have difficulty in protecting himself and

...and when were sustained, answers to others were stricken

...and in some instances appellant's objections were not
...or motions made to strike the answer. We are of the opinion

...no prejudicial error was committed in this regard.

The trial court refused to exclude the evidence and direct a

verdict for appellant, and this is assigned as error. Appellant's

petition is that under the events of the first count he had the

right of way and therefore appellee was guilty of contributory negli-

gence. Sec. 33 of the Motor Vehicle Law provides that all vehicles

...shall be driven on the right side of the highway.

...and shall not be driven on the left side of the highway.

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the occupants of the other vehicle. To avail himself of the protection which the right of way implies, it was his duty to make the turn at that intersection at a rate of speed not exceeding eight miles an hour. The question of contributory negligence, upon the facts of this case, was properly a question for the jury under proper instructions, and was not a question for the court. The question was so submitted to the jury and its finding that appellee was not chargeable with contributory negligence is fully supported by the evidence. As soon as appellee's driver discovered the other car she attempted to turn out of its way to the left and avoid being run into. If she had turned to the right she would have turned directly into its path. Appellee's car was being driven on the dirt road north of the gravel center, or on the right hand and proper side of the road. When appellant first discovered appellee's car, it was about forty feet east of the intersection and turning up onto the gravel portion of the road. Appellant was just then entering the main road, and if he saw appellee's car starting to turn up onto the gravel while his own car was going at the rate of speed he claimed it was going he must have known that if he attempted to cross in front of appellee's car a collision would inevitably result.

Our conclusion from all the evidence is that appellant's car was rounding the corner at a high and dangerous rate of speed. The impact came at a point thirty feet south and at least twenty feet east of where appellant was when he first saw appellee's car. The fact that the right front fender of appellee's car was not struck, but the front end of appellant's car hit the rear of appellee's car; that appellant's baby was thrown forward by the impact with sufficient force to break the windshield and cut the baby's head; that his five year old son was thrown from a chair back of the front seat over the left front door; and that appellee's son was thrown out over the right door between the two cars, shows conclusively that the impact came from appellant's car and that it was traveling at an excessive rate of speed.

It is claimed that because no replication was filed to the pleas

of son assault demesne interposed to the third and fourth counts, the pleas stand admitted. It is well settled that a failure to join issue is not available on appeal where the parties go to trial on the pleadings as if the issue had been joined. (Devine v. Chicago City Ry. Co. 237 Ill. 278) The court properly denied the motion of appellant to direct a verdict.

We have carefully examined every given, modified and refused instruction of which appellant complains. There are some inaccuracies but the law applicable to the case as set forth in the instructions was substantially correct.

The remarks of appellee's counsel to which objections were sustained should not have been made, but in view of the injuries to person and property sustained by appellee, and also in view of the amount of damages awarded, it is apparent the verdict was not the result of passion or prejudice. It was so ~~an~~ obviously right that a new trial ought not to be granted. To justify a reversal on account of error, it must appear from the record that upon another trial, if the same error does not intervene a different result might be expected. Where it can be said from the record that the error assigned could not reasonably affect the result of the trial, the judgment should be affirmed. (Stansfield v. Wood 231 Ill. App. 586; People v. Heard 305 Ill. 319; People v. Weir 295 Ill. 268.) We cannot believe that if another trial were granted the result would be materially different. The judgment of the circuit court is affirmed.

Judgment Affirmed.

the court's decision in *People v. Heard*, 305 Ill. 519, 129 S.W.2d 885, 111 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

We have carefully examined every given, modified and refused
instructions of which appellant complains. There are some inaccuracies
the law applicable to the case as set forth in the instructions
and substantially correct.
The remarks of appellee's counsel to which objections were
made should not have been made, but in view of the injuries to
and property sustained by appellee, and also in view of the
damages awarded, it is apparent the verdict was not the
result of passion or prejudice. It was a judgmentally right that
ought not to be granted. To justify a reversal on
ground of error, it must appear from the record that upon another
trial, if the same error were committed, a different result
would be expected. Where it can be said from the record that the
error assigned could not reasonably affect the result of the trial,
the judgment should be affirmed. (*Stansfield v. Wood*, 331 Ill. App.
People v. Heard, 305 Ill. 519; *People v. Wood*, 335 Ill. 268.)
We do not believe that if another trial were granted the result
would be materially different. The judgment of the circuit court is

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 9th day of
April in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 633

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 5 1926, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Albert Randall, Sheriff of
Peoria County, Illinois, for
the use of Citizens Ice and
Cold Storage Co. (a Corpora-
tion) and Jennings Fruit Co. (a
Corporation)

Appellee,

vs.

Appeal from the
Circuit Court of
Peoria, County.

John A. Eck Co. (a Corporation)
and Aetna Casualty and Surety
Co., (a Corporation)

Appellants.

241 I.A. 633

Jones R.J.

Appellee brought an action in debt on a replevin bond in the circuit court of Peoria County against John A. Eck and Aetna Casualty & Surety Company, appellants, to recover the value of two carloads of apples consisting of 1522 boxes, which had been replevined by John A. Eck Company from Citizens Ice and Cold Storage Company of Peoria, together with interest on the value of the apples and also attorney's fees incurred by Citizens Ice and Cold Storage Company in defending the replevin suit. The Aetna Casualty & Surety Company was surety on the replevin bond. The cause was tried by the court without the intervention of a jury. The court found the issues in favor of appellee and rendered judgment for \$6000 debt, and \$2382.90 damages. This sum includes \$3000 as the market value of the apples, \$150 for attorney's fees and \$232.90 as interest on the \$3000 valuation of the apples. From this judgment appellants have prosecuted an appeal.

The declaration alleges the suing out of the replevin writ by John A. Eck Company; the giving of the replevin bond; the taking of the apples from the Citizens Ice and Cold Storage Company; the judgment of the court that the Citizens' Ice and Cold Storage Company was entitled to the possession of the apples at the time of the commencement of the replevin suit and that accordingly, when in Jennings Fruit Company, the owner for the return of the apples, and the failure of John A. Eck Company to make return thereof. Appellants filed several pleas, to all of which demurrers were sustained

and light

EEB .A. 143

except to the unverified plea of non est factum. This was the only plea on which the case was tried.

On the hearing of the cause, appellee offered in evidence the files and judgment record in the replevin case and evidence to the effect that the apples had not been returned. The affidavit for replevin which was introduced in evidence in the trial court was made by H. J. Miller, traffic manager and agent of John A. Bok Company, and states that the cars contained 756 boxes each or 1512 boxes in all and were of the value of \$3000. The replevin bond and the declaration in the replevin suit which were introduced in evidence by appellee contain like statements. The return of the sheriff on the replevin writ shows that he replevined from Citizens Ice and Cold Storage Company two carloads of apples, containing 1512 boxes of apples, and turned them over to the plaintiff in the replevin suit. In the trial court appellants relied upon the testimony of Miller who made the affidavit for replevin. He was called as a witness and was permitted to testify subject to objection of appellee, among other things, that the two cars in question contained 1512 boxes of fancy winesap apples and were worth, on December 1, 1928, the day they were replevined, \$2.00 a box delivered at Peoria, and that when he made his affidavit in the replevin suit stating that the value of the apples was \$3000 he then took into consideration the freight charges against them. The record discloses that the witness Miller on cross examination testified that the value of the apples in Peoria on December 1, 1928 was \$1.00 a box, as is indicated in the additional abstract page 8. The appellants admit that appellee is entitled to recover in this case, interest and attorney's fees, but insist that the court erred in fixing the value of the apples at \$3000. The contention is based upon the claim that a credit for \$118.14 for freight charges should have been allowed. The real question involved in this case is whether the court erred in refusing appellants such credit. Appellee insists that the appellants are estopped to deny that the value of the apples was \$3000 as stated in the

affidavit, and that even if the testimony of Miller was competent, the weight of all the evidence in the case fairly shows that the market value of the apples was in excess of \$3000 on December 1, 1925. The unverified plea of non est factum is a declaration on a specialty puts nothing in issue. At the common law that plea only put in issue the execution of the bond, but under Sec. 52, Chap. 110 Revised Statutes, it does not do that, unless it is verified. (Baggs v. Chicago Bonding & Surety Co. 207 Ill. App. 621 p. 625; People v. Leckermann 146 Ill. 201; Fleet v. Hartz 98 Ill. 534; Merrick v. Lantz 72 Ill. 340 p. 342.) In Loman v. United States Fidelity & Guaranty Company 137 Ill. App. 265 where such a plea was interposed in an action of covenant, the court said, "This plea raised no issue as to the amount of damages. By this plea a defendant only averred that the bond was his bond." In Vix v. People 92 Ill. 549 it is said of such a plea "When interposed, the defendant may take advantage of any variance between the instrument and the declaration. If, however, defendant intends to deny that he ~~knows~~ ever executed the writing obligatory sued on, he is required to verify this plea by affidavit, etc. * * * We are unable to see that, under it, proof of avoidance could be made." In the instant case the evidence offered is an attempt to show that the value of the apples was less than the amount stated in the affidavit, replevin bond and the declaration of appellants in the replevin suit, was clearly inadmissible under this rule.

~~Example~~

In support of the contention that a credit for \$1186.14 for freight paid on the apples, Farson v. Gilbert 85 Ill. App. 244 is cited. To our minds that case is not in point. The facts are very different. In the case at bar the appellee, Citizens Ice and Cold Storage Company, pleaded title in the Jennings Fruit Company. The case was tried on its merits and the court found that the property belonged to the Jennings Fruit Company and that Citizens Ice and Cold Storage Company was entitled to the possession thereof. All the parties to this suit are bound by that adjudication

of Miller was computed.

It fairly shows that the

125000 on December

The defendant's plan of non est is a declaration of

that there is nothing in issue. It is a declaration of

that the execution of the bond, but under the act of

and therefore, it does not do what, unless it is verified.

v. Chicago Bonding & Surety Co. 107 Ill. App. 611 p. 611

v. Laumann 146 Ill. 201; First v. Harris 98 Ill. 254; Harris

v. 111. 240 p. 245. In Lewis v. United States Realty

and Company 127 Ill. App. 266 where such a plea was introduced

as a plea of government, the court said, "This plea raises no

the amount of damages. It is a plea of payment only.

that the bond was his bond." In Mix v. People 92 Ill. 240

of such a plea. When introduced, the defendant may take

defendant intends to deny that he never ever executed

definitely used or, he is required to verify this plea by

could be made. In the instant case the evidence offered

support of the contention that a credit for \$1000 is

paid on the appeal, Person v. United 111. App.

To our minds that case is not in point. The facts

In the case at bar the appellant, citizen

4.

and no question concerning a lien for freight charges is here involved. In the *Jarson* case, there was no adjudication as to the ownership of the property replevined, the replevin case having been dismissed for want of prosecution. As between the parties to an action on a replevin bond, the ownership of goods is res adjudicata because of the judgment in the replevin suit. (*Cornuk v. Tugenheim Laundry Machinery Co.* 196 Ill. App. 202; 34 Cyc. 1587.) Appellants cannot now be permitted to make proof of a lien or of any matter, which tends to dispute the title and ownership of the appellants as found by the judgment in the replevin suit. (*American Lacking Company v. Luketa* 22 Ill. App. 200; 113 Wash. 1; 192 Pac. 1.)

Appellants also assign for error the trial court's ruling in sustaining a demurrer to their plea of set off seeking credit for the freight paid, but it appears that they did not abide by their plea and this assignment is not urged in their brief and argument, and they have therefore abandoned it. Aside from this, the payment of the freight was voluntary. A party cannot by direct action or by way of set-off or counterclaim, recover money voluntarily paid with the full knowledge of all the facts and without any fraud, duress or extortion, where no obligation to make such payment existed. The rule is an elementary one and in applying it, the courts have held that it makes no difference that the debt paid was that of a third party. (30 Cyc. p. 1298) It is not sufficient that appellees were benefited by the payment, but it must have been done at their request, express or implied, and appellants can only recover on proof of facts that would show such a request. One party cannot voluntarily make himself a creditor of another, and if appellants paid the obligations of appellees without their knowledge or consent, they cannot recover back such payment. (*Chicago v. Chicago & N. W. Ry. Co.* 186 Ill. 304.) Set-off can be pleaded only where there is an indebtedness from the plaintiff, which might be made the subject of an independent suit. (*Litch v. Clinch*, 136 Ill. 410; *Becker v. Becker* 172 Ill. App. 410; *Albrecht v. Wilkin* 224 Ill. 411.)

5.

The action of the trial court in sustaining the demurrer to the plea of set-off was right and this leaves no issue except that made by the unverified plea of non est return.

The case of *Varson v. Gilbert*, supra, has never been followed and seems to have been overruled by at least three later cases. These cases all hold that where the value of the property is stated in the affidavit for replevin, plaintiff in replevin is estopped thereby in an action on the bond to show that it was of less value than the amount so stated. (*Wright v. ...*, *... k* *v. Cable Piano Co.* 211 Id. 229; *Moore v. Beach Co.* 221 Id. 302.) The case of *O'Donnell v. Colby* 55 Ill. App. 112 is to the same effect. *Washington Ice Co. v. Webster* 125 U. S. 426 holds that in a writ on a replevin bond the plaintiff in the replevin suit cannot show that the property taken under the writ was less in value than the sum stated in the writ and bond, and has been frequently cited and followed. As a general rule a plaintiff in replevin and his co-defendants are estopped in an action on the replevin bond to set up any matter of defense which is contradictory to or inconsistent with the material recitals in the bond, except where the bond is void in its inception and possesses no force or validity. Thus, where the value of the property is recited in the bond, plaintiff in replevin is estopped thereby in an action on the bond to show that it was of less value than the amount so stated. (34 Cyc. Replevin 1295.)

In view of the record as made in this case and the law applicable to the facts, we are of the opinion that the judgment of the circuit court was right.

Judgment Affirmed

STATE OF ILLINOIS,) ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.)
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 18th day of
June in the year of our Lord one thousand
nine hundred and twenty-seven
Justus L. Johnson
Clerk of the Appellate Court.

Abstract only
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 634

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1926

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



La Salle Extension University and
W. E. McIntosh, Justice of the Peace,
(La Salle Extension University,

appellant)

Appeal from Circuit Court

vs.

of Boone County.

John A. Gallagher,

appellee,

241 I.A. 634

Jones, P. J.

In October, 1924, La Salle Extension University obtained a judgment against John A. Gallagher for \$87.50 and costs before W.E. McIntosh, a justice of the peace of Boone County, on a note and contract for a correspondence course of instruction. Appellee did not appeal from this judgment but on November 15th, he filed his petition for a writ of certiorari in the circuit court of Boone County against appellant and the said justice of the peace. Appellant claims to have filed two motions, one to quash the writ on the ground that it was improvidently issued and another to quash the writ because the petition was insufficient. It also claims to have withdrawn the first one and that the second one was denied. The motions do not appear in the abstract and we are unable to determine whether the court's ruling was correct or not, unless we search the record to find and examine the motion. This we are not expected to do. (Baier v. Selke, 112 Ill. App. 568). The attorneys in preparing abstracts and briefs should not disregard the rules of court or be unmindful of language employed in Traeger v. Mutual Building Ass'n, 189 Ill. 314. The cause was heard de novo by the court without a jury. Certain propositions of law were offered by appellant, two of which were refused by the court, and judgment rendered for appellee. A motion for new trial was overruled and this appeal followed.

Appellee's defense to the merits is based on fraud, and failure of consideration. According to his testimony, he was an employee of the Standard Oil Company and one L. W. Pietch, district manager for appellee's employer, told him he would have to take the course of appellant's instruction because his employer was making it compulsory

and that he would have to take it in thirty days or lose his job. Appellee told Pietch that he could not afford it, whereupon Pietch guaranteed him an increase of \$25 a month if he would take it, and he then agreed to do it. Appellee claims that Pietch was also in appellant's employ. He further testified that about a week afterward he signed the contract and paid \$10 to Pietch and another representative of appellant and that at this time Pietch told him, in the presence of the other representative, that if he didn't sign the contract and note, he would lose his job. It appears from the evidence that appellee's employer did not require its employees to take any course in salesmanship or any instruction except what the employer furnished. It also appears that appellee received his pay twice a month; and that under this arrangement he received two extra pay checks for \$12.50 each. When he received the first one, he told Pietch of having received it in a separate check, and Pietch explained that they probably didn't get it through in time to make his regular check and made the other check afterwards. After receiving the two extra checks he received no further extra payment above his regular salary and wrote to his employer about it. His employer informed him there was something wrong about it and that Pietch had been turning him in for overtime. When appellee thus found out the deception which had been practiced upon him, he wrote to appellant and rescinded his contract. Thereafter appellant sent him no more lessons. Up to this time he had received only one lesson from appellant which he testified was not a lesson but an introduction outlining the course and worth possibly \$5.00. Appellant claims that because appellee did not return the lesson received by him, he cannot take advantage of the fraud. If appellee paid appellant \$10 on a contract procured by fraud and received thereunder a lesson worth \$5.00, as appears from the evidence, appellant is in no position to say that appellee must restore what he received before he can take advantage of the fraud. It is true as a general proposition of law that one who is induced by fraud to enter into a contract with another, must, within a reasonable

time after discovering the fraud, notify the other party of its rescission and restore to him whatever consideration he has received under it, but he is not bound to restore to the other party what he has received under it, where the other party is indebted to him in a larger ^{amount.} (Girard v. St. Louis Car Wheel Co. 46 Mo. App. 76 p. 105; 13 C.J. Contracts Sec. 681 note 68.) This rule, like other meritorious rules, must be so applied in the practical administration of justice as shall best subserve, in each particular case, the undoing of wrong and the vindication of right. (6 R.C.L. Contracts, Sec. 322.)

Appellant further claims that when appellee repudiated the contract, appellant kept the contract alive, being all the while able, ready and willing to perform until after time for performance by appellee. Of this there is no evidence in the record. Appellant made no effort to prove that it had performed or offered to perform its contract, not that it was able, ready or willing to perform it. For that purpose, the presiding judge of the trial court proposed during the trial to give appellant's counsel time to produce the correspondence, but the offer was declined. It is well settled that where one party repudiates a contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies. He may treat the contract as rescinded and recover upon quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover, under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, the plaintiff must allege and prove performance upon his part, or a legal excuse for non performance. (L.S' & M.S.

the other party of the contract, notwithstanding the fact that the other party has received consideration therefor, it is not binding upon the other party what he has promised to do, where the other party is indebted to him in money or property. (See, for example, *St. Louis Car Wheel Co. v. St. Louis Car Wheel Co.*, 104 Mo. 241, 12 S.W. 2d 104.) This rule, like other rules of law, must be so applied in the practical administration of justice as to do no injustice, in each particular case, the unfolding of wrongs, and the establishment of rights. (See, for example, *St. Louis Car Wheel Co. v. St. Louis Car Wheel Co.*, 104 Mo. 241, 12 S.W. 2d 104.)

It is here that no evidence in the record. Appellate may not attempt to prove that it had performed or offered to perform the contract, but that it was able, ready or willing to perform it. For that purpose, the trial court cannot propose during the trial to the appellant's counsel time to produce the correspondence, but the offer was declined. It is well settled that where one party refuses to perform, and the other is ready, willing and able to perform, the contract is not binding upon the party who refused to perform, and at the end of the time specified in the contract for performance, and recovery, under the contract, or he may treat the contract as put off and to the contract for all purposes of performance, and one for the profits he would have realized if he had performed. In the latter case the contract will be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering the profits, treating the contract as repudiated

Ry. Co. v. Richards, 152 Ill. 59). Where one party to a contract refuses to perform and the other party elects to continue the contract for the benefit of both parties, he is bound to show, on the trial, that he was ready, willing and able to perform his part of the contract. (Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 560, p. 667; Grays Harbor Com. Co. v. Turnbull--Joice Lumber Co. 163 Ill. App. 231; Plumb v. Taylor, 27 id. 238; Lassen v. Mitchell, 41 Ill. 101)

Appellant also assigns as error the trial court's action in admitting certain testimony of appellee over appellant's objection. The testimony complained of was heard subject to objection. The case having been tried before the court without a jury, the presumption is that the court considered only such testimony as was proper to be considered bearing upon the issues. Appellant claims that the trial court erred in refusing to hold two of the propositions of law submitted by it, but we do not regard the refusal of the court as erroneous.

Finding no reversible error in the record the judgment of the circuit court is affirmed.

Judgment affirmed.

1. v. Richards, 122 Ill. 50. Where one party to a contract

refuses to perform on the other party's demand, the latter

may sue for the amount of the contract, or for the value of the

property destroyed, or for the cost of the repairs.

2. v. Roebeling's Sons, Co. v. Hook & Stitch Fence Co., 120 Ill. 68.

3. v. ...

4. v. ...

5. v. ...

6. v. ...

7. v. ...

8. v. ...

9. v. ...

10. v. ...

11. v. ...

12. v. ...

13. v. ...

14. v. ...

15. v. ...

Judgment affirmed.

STATE OF ILLINOIS, ss. J. JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 9th day of
April in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 634

Present--The Hon. NORMAN L. JONES, Présiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 5 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

William Ketcham, et al,
Appellants,

v.

Appeal from
Circuit Court
of Will County.

School Trustees of Township
No. 34, Range No. 8, Grundy
County, Illinois, et al,
Appellees,

241 I.A. 634

Jones E. J.

This is an appeal from a judgment of the circuit court of ~~of Will~~ of Will County dismissing the petitions in five separate mandamus proceedings instituted by the several respective groups of petitioners therein against the School Trustees of Township No. 34, Range No. 8, Grundy County, Illinois, the School Trustees of Township No. 35, Range No. 8 in Kendall County, Illinois, the School Trustees of Township No. 34, Range No. 9 in Will County, Illinois and the School Trustees of Township No. 35, Range No. 9 in Will County, Illinois. The causes on said petitions were consolidated by the court. With the exception of the names of the respective petitioners and inconsequential differences in dates and descriptions the petitions are alike.

It appears that on April 20, 1920, school districts 91, 92 and 94 in Grundy County, and school districts 18 and 25 in Will County, together with the Minooka school district and two other school district in Kendall County, Illinois, were organized into a community consolidated school district, known as Community Consolidated School District No. 201, by an election called by the county superintendent of schools of Grundy County. The petitions in this cause were filed in the circuit court on behalf of said districts 91, 92, 94, 18 and 25. They allege the organization of the community consolidated district, the various steps taken which finally resulted in the detachment of said districts and the organization of new districts, the demand for a distribution of the tax funds or other funds in the hands of the township ~~trust~~ treasurers of said townships, and of the funds to which the common school district

Appeal from
Circuit Court
of Will County.

William Ketchum, et al,
Appellants,

School Trustees of Township
No. 34, Range No. 3, Grundy
County, Illinois, et al,
Appellees.

241 I.A. 634

This is an appeal from a judgment of the circuit court of Will County dismissing the petitions in five separate mandamus proceedings instituted by the several respective groups of petitioners against the School Trustees of Township No. 34, Range No. 3, Grundy County, Illinois, the School Trustees of Township No. 8 in Kendall County, Illinois, the School Trustees of Township No. 9 in Will County, Illinois and the School Trustees of Township No. 35, Range No. 3 in Will County, Illinois. The causes on said petitions were consolidated by the court with the exception of the names of the respective

It appears that on April 30, 1930, school districts 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

2.

was at the time of detachment entitled in accordance with Sec. 64 of the School Act and for the appointment of appraisers in accordance with Sec. 65 of said Act, and the neglect and refusal of the school trustees to comply with said demand. The prayer is for a writ of mandamus against the school trustees to compel them to conform to the request. After the filing of the petitions Community Consolidated School District No. 201 presented to the court a petition for leave to be made a defendant to each petition and for leave to plead. Leave being granted, it filed three pleas. The first plea was to the jurisdiction of the court; the second, that the Detachment Act is unconstitutional; and the third, that Sec. 64 and 65 of the School Act do not apply to community consolidated school districts. Demurrers were filed by the original petitioners in each case to these three pleas, and subsequently the first and second pleas were withdrawn. Upon motion of the Community Consolidated School District, the demurrers to the third plea were carried back and sustained to the petitions. The petitioners elected to stand by their petitions and the court thereupon dismissed them. From this order the petitioners have appealed to this court.

Appellants concede that under the Community Consolidated School Act there is no provision for the distribution of funds when districts are detached from a consolidated district, but it is contended that under Secs. 64 and 65 of the General School law, the districts detached are entitled to their pro rata share of the funds in the hands of the school treasurers at the time of detachment. But the trial court held against that contention and that there is no remedy provided by statute.

This question was before us at the April Term, 1925, in School Directors of District No. 89, County of Winnebago, et al, v. Trustees of Schools of Township 26 North, Range 10, East et al, General number 7392. We there held that under said Secs. 64 and 65 districts which had been detached under the Community Consolidated School Act were entitled to their pro rata share of the funds in the hands of the

was at the time of detachment entitled in accordance with Sec. 64 of

with Sec. 65 of said act, and the neglect and refusal of the school
trustees to comply with said demands. The prayer is for a writ of

in the School District No. 201 presented to the court a petition
to be made a defendant to each petition and for leave
to be granted, it filed three pleas. The first
to the jurisdiction of the court; the second, that the
act is unconstitutional; and the third, that

of the School act do not apply to community consolidated
districts. Demurrers were filed by the original petitioners
in case to these three pleas, and subsequently the first and
second pleas were withdrawn. Upon motion of the Community Consoli-
dated School District, the demurrers to the third plea were carried
and sustained to the petitioners. The petitioners elected to
stand by their petitions and the court thereupon dismissed them.
In order the petitioners have appealed to this court.

Appellants concede that under the Community Consolidated
act there is no provision for the distribution of funds when
they are detached from a consolidated district, but it is con-
ceded that under Secs. 64 and 65 of the General School law, the
detached are entitled to their pro rata share of the funds
in the hands of the school trustees at the time of detachment.
The trial court held against that contention and that there is

Trustees of District No. 201, County of Winnebago, et al, vs. Trustees
of Township 26 North, Range 10, East of 1st General
We there held that under said Secs. 64 and 65 districts

3.

treasurer and that this right could be enforced by mandamus. We think the word "former" was used advisedly by the legislature. When common school districts are organized into a consolidated district, the former districts not only cease to function but they cease to exist for any purpose. When that territory is again organized into common school districts they become new districts. We believe the opinion of this court in the case of School Directors of District No. 89, County of Winnebago, et al v. Trustees of Schools et al, supra, correctly states the law and is conclusive of the question at issue here. For that reason the demurrers to the third plea were erroneously carried back to the petitions and sustained. The judgment will therefore be reversed and the cause remanded with directions to sustain the demurrers to the third plea.

Reversed and Remanded with directions

STATE OF ILLINOIS, ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court at Ottawa, this 9th day of
April in the year of our Lord one thousand
nine hundred and twenty-six

Justus L. Johnson
Clerk of the Appellate Court.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord *1926* one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 634

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 5 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Marie A. Baker,

appellee,

vs.

Appeal from the Circuit Court
of La Salle County.

Edward Baker,

appellant,

241 I.A. 634

Jones, P. J.

On July 11th, 1923, appellee obtained a decree for divorce from appellant in the circuit court of La Salle County. The chancellor reserved and took under advisement the question of alimony, and on February 11th, 1924, entered a decree fixing permanent alimony. Appellant prosecuted an appeal from the latter decree to this court, which was heard at the April Term, 1924. The decree of the circuit court was reversed and the cause remanded with directions to decrease the amount of alimony. The cause was re-docketed in the circuit court and on February 9th, 1925, in compliance with the mandate of this court, a decree decreasing the alimony was entered. Both decrees of the circuit court contained the following provision: "It is further ordered, adjudged and decreed by the court that complainant be, and she hereby is, given the sole ownership, and the right to take and appropriate to her own exclusive use, all articles of personal property and household furniture belonging to her, and now located in the premises occupied by said complainant as a residence, said articles to include all those which said complainant purchased with money saved by her, and also any other articles of household furniture now on or in said premises, and which are reasonably necessary for complainant's use in keeping house." The decree awarded appellee the occupancy of the premises, rent free, where she and appellant had resided and where she still lived, until February 11, 1925, and required her to vacate the premises on that date, which she did. The house is quite large containing twelve rooms. At the time of the filing of the bill for divorce the family consisted of the husband and wife, a daughter Edith Baker, and an invalid son, Stephen Baker, about fifteen years of age, who it appears is ill and resides

of La Salle County.

433 .A.1 142

in Arizona. The decree for alimony finds that appellant is worth between \$110,000 and \$180,000 and provides that \$1000 be paid appellee annually for the education of their son, and \$2000 annually for her own support and maintenance. Appellee and her daughter occupied the house until shortly after the marriage of the daughter to Richard Howard. On February 11, 1925, they moved into an eight room house purchased by Howard. Under an arrangement to live with Howard and his wife, appellee furnished the new home with said household goods. On May 2, 1925, appellant filed in the circuit court the petition in this case, which alleged that appellee had sold two rugs and removed all the furniture from the house and that it was not reasonably necessary or possible for her to use any considerable portion of such household goods and furniture in keeping house. The prayer of the petition was for an order requiring appellee to return all the household goods and furniture, including that which she had sold, excepting only such articles as the court might find are reasonably necessary for her own use in keeping house. Appellee appeared and answered the petition and upon the hearing an order was entered by the court denying the prayer of the petition and dismissing it at appellant's costs.

There is considerable conflict in the testimony as to the amount and value of this property. Appellant testified that it was worth from \$12,000 to \$15,000. His brother, an insurance agent, testified that he considered it worth \$6,000 or \$7,000 at the time the divorce proceeding was instituted, but he insured all of it, with the exception of two pianos, for only \$3,000. Edward Olson, a furniture dealer of twenty-five years' experience, testified that he had examined the furniture the night before the hearing and that \$600 was a good, fair value for it. It also appears from the testimony that some of the furniture was twelve to thirteen years old, including rugs, and the balance about twenty-five years old. We are inclined to believe that the goods which appellee took were probably of little intrinsic value. It is claimed by appellant and admitted by appellee that she sold two rugs for \$202.50, in April, 1924. The proceeds she used in purchasing other furnishings for the house to which she moved. She sold two beds

and dressers and an old dining table, the latter having been bought with her own money, and out of the proceeds purchased a kitchen cabinet. The testimony shows that appellee used all such furniture and furnishings in the new home and that she did this lieu of rent. She pays one-third of the expenses of the house, but has no arrangement for any definite period. Perhaps her sale of the two rugs, beds and dressers was not in exact accord with the decree for alimony, but it appears that the money was used in ^{the} purchase of other furnishings, and that her new home is not over-furnished. Considering her station in life, the furnishings appear to be reasonably necessary for her use in keeping house, whether she continues to reside with her daughter or elsewhere. We do not think appellant's complaint as to these sales is of sufficient consequence to reverse the decree of the circuit court.

Appellant also claims that appellee burned and destroyed some of his clothing that was in the house she vacated. Appellee testified that these articles with the exception of a fur-lined overcoat were kept in the attic, together with some of her own clothing, ^{and} all of it had become so infested with moths that she had to destroy it. This is the only evidence of any destruction or burning of any article by appellee.

Appellant's counsel severely criticises the chancellor who decided this case. Such criticism is unwarranted. The chancellor's holdings disclose no partiality or unfairness. The reversal of a former decree does not reflect upon the judge who rendered it.

It is apparent from the evidence that there has been considerable strife between the parties to this cause, and there is a great difference in their versions of the facts. The chancellor having seen and heard the witnesses was in a better position than we are in to judge the merits of the controversy, and we do not feel justified in reversing the decree. It is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 9th day of
April in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
October, in the year of our Lord one thousand nine hundred
and twenty-five, within and for the Second District of the
State of Illinois:

241 I.A. 634

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

APR 5 1926

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Ilewllyn C. Looker,

appellee,

vs.

Henry Buente,

appellant,

Appeal from the Circuit Court
of Kankakee County.

241 T.A. 634

Jones, P. J.

Appellee recovered a judgment against appellant for \$1100 in the circuit court of Kankakee County for services performed by appellee as a civil engineer in the attempted organization of a drainage district under the Levee Act. The declaration consisted of two counts, and there was filed with it an affidavit of plaintiff's claim for \$2,177.50. The defendant filed a plea of the general issue, accompanied by an affidavit of merits stating that he did not hire or contract with appellee to perform any service whatever; that he signed a petition for the organization of a drainage district at the request of Tom Martin; that it did not authorize the employment of appellee or any other person; that the district was never organized; ~~xxxxxx~~ and that he was not indebted to appellee in any sum whatever. The cause was heard before a jury which returned a verdict for appellee in the sum of \$1100. Judgment was rendered on the verdict and this appeal followed.

Appellant claims that Looker was employed by L. B. Bratton, the attorney who filed the petition for the organization of the drainage district; that the relation of attorney and client did not exist between Bratton and appellant; and that Bratton had no authority to employ Looker. The evidence shows that appellant and Thomas Martin, the man who circulated the petition, together with a number of other landowners, for some time had been discussing a plan to form a mutual drainage district, but had abandoned that plan and decided to form a district under the Levee Act. Martin consulted Bratton, who advised Martin to circulate the petition and Bratton agreed to perform the necessary legal work. The hiring of an engineer was talked over

between them and Martin told Bratton it was satisfactory for Bratton to hire appellee as engineer on the strength of the signatures. The petition was of considerable length and Martin circulated only the last sheet of it, which was headed "Prayer". The signatures were affixed to this sheet, with the understanding between Martin and the other signers that all other papers necessary were to be attached later. The sheet on which the signatures were secured contained the following:

"P R A Y E R"

"Wherefore, we, the undersigned petitioners herein, pray that said proposed drainage district be organized under the Levee Act of the State of Illinois, for the purpose of establishing a combined system of drainage independent of levees, and that the court appoint commissioners for the execution of said proposed work in accordance with the Statutes in such case made and provided; and that said drainage district be named, known as and called Salina Union Drainage District No. 1 of the towns of Salina and Limestone, county of Kankakee, State of Illinois."

Thirty-four landowners signed this sheet. Martin secured the signatures of twenty-six, including appellant. The remainder were obtained at Bratton's office, or while the petition was in his possession. The petition when filed contained from thirty-five to forty sheets, including the signature sheet, and a sheet which recited the employment of Bratton as attorney and his authority to amend the petition in any manner he might deem proper and necessary for the effective legal organization of the district.

The evidence shows that Bratton told Looker he had been instructed by the petitioners to form a district and that appellee had been mentioned by them as a satisfactory person to employ as an engineer, and that he thereafter engaged appellee. The preliminary engineering work began about December 18, 1919. The field work began in May, 1920, and the last item of work charged for was in April, 1921, so that his work covered a period of more than two years. During the time appellee was engaged in the field work, he and his assistants took

between them and Martin told Bratton it was satisfactory for Bratton to hire appellee as engineer on the strength of the signatures. The petition was of considerable length and Martin circulated only the last sheet of it, which was headed "Prayer". The signatures were affixed to this sheet, with the understanding between Martin and the other signers that all other papers necessary were to be attached later. The sheet on which the signatures were secured contained the

following:

"P R A Y E R"

"Wherefore, we, the undersigned petitioners herein, pray that said proposed drainage district be organized under the Levee Act of the State of Illinois, for the purpose of establishing a bonded system of drainage independent of levees, and that the court appoint commissioners for the execution of said proposed work in accordance with the Statute in such case made and provided; and that said drainage district be named, known as and called Salina Union Drainage District No. 1 of the towns of Salina and Limestone, County of Kanawha, State of Illinois.

Thirty-four landowners signed this sheet. Martin secured the signatures of twenty-six, including appellant. The remainder were obtained at Bratton's office, or while the petition was in his possession. The petition when filed contained from thirty-five to forty sheets, including the signature sheet, and a sheet which recited the employment of Bratton as attorney and his authority to amend the petition in any manner he might deem proper and necessary for the effective organization of the district.

The evidence shows that Bratton told Hooker he had been instructed by the petitioners to form a district and that appellee had been employed by them as a satisfactory person to employ as an engineer, that he thereafter engaged appellee. The preliminary engineering work began about December 18, 1919. The field work began in May, 1920, and the first item of work charged for was in April, 1921, so that

dinner at appellant's house at least five times and appellee paid for the meals. At such times he and appellant talked over the matter of the district organization, how it was progressing, the plan of drainage, and where appellant desired the drains to be laid through his land. He went to appellee's office in Kankakee five or six times and inquired how the proposition was getting along, what work appellee was doing and what lines were being run. Appellee on these occasions took the plat of the district as far as completed, showed it to appellant and talked with him about the plan. Appellant had no other business at appellee's office. He never objected to anything that was being done. He also visited Bratton's office ten or twelve times, starting in the early part of 1920 and continuing about once each month up until the petition for the drainage district was completed. He came on that particular business and no other, and they talked nothing else. After the petition was filed he withdrew as a petitioner and later, when several hearings in court had been held, he went to Bratton's office and again become a petitioner by signing the following statement, which was filed in the county court: "I, the undersigned, Henry Buente, do hereby withdraw the affidavit made by me, together with a copy of the notice therewith, and now on file in said cause, and hereby acknowledge myself to be now, and at the time of the filing of the petition in said matter a petitioner thereon, and request that I be considered one of the petitioners by said Court." At this time the sheet containing the recitals about the employment of Bratton as attorney was attached to and was a part of the petition on file in the cause. Considering this fact as well as appellee's prior conduct, it is idle for him to say that the relation of attorney and client did not exist between him and Bratton or that he did not acquiesce and consent to what Bratton had done. He knew of the employment of both the attorney and the engineer, and consulted each frequently, not only as to the drainage of his own land, but in regard to the entire district. Where one performs for another, a useful service of a character that is usually charged for, and

dinner at appellant's house at least five times and appellee paid for the meals. At such times he and appellee talked over the matter of the district organization, how it was progressing, the plan of drainage, and where appellee desired the drains to be laid through his land. He went to appellee's office in Kansas five or six times and inquired how the proposition was getting along, what work appellee was doing and what times were being run. Appellee on these occasions took the plat of the district as far as completed, showed it to appellant and talked with him about the plan. Appellant had no other business at appellee's office. He never objected to anything that was being done. He also visited Bratton's office ten or twelve times, starting in the early part of 1930 and continuing about once each month up until the petition for the drainage district was completed. He came on that particular business and no other, and they talked nothing else. After the petition was filed he withdrew as a petitioner and later, when several hearings in court had been held, he went to Bratton's office and again became a petitioner by signing the following statement, which was filed in the county court: "I, the undersigned, Henry Rente, do hereby withdraw the affidavit made by me, together with a copy of the notice therewith, and now on file in said court, and hereby acknowledge myself to be now, and at the time of the filing of the petition in said matter a petitioner thereon, and request that I be considered one of the petitioners by said Court." At this time the sheet containing the recitals about the employment of Bratton as attorney was attached to and was a part of the petition on file in the cause. Considering this fact as well as appellee's prior conduct, it is idle for him to say that the relation of attorney and client did not exist between him and Bratton or that he did not know of the employment of both the attorney and the engineer, and consulted each separately, not only as to the business of his own land, but in regard to the entire district. And the further the appellant is removed from a connection with the drainage district, the more

the latter knows of it and expresses no dissent, but avails himself of the service, a promise to pay the reasonable value of the service is implied. While the evidence fairly shows that both Bratton and Looker were in fact actually employed by the petitioners, of whom appellant was one, yet if there was any doubt about such actual employment, we would not hesitate to hold, under the evidence in this case, that there was an implied employment and promise to pay. The voluminous citations of authorities by appellant on this subject are not in point.

The contention of appellant that the signature sheet did not create a joint and several obligation under Sec. 3 of Chapter 76, Revised Statutes, is without merit. Appellee's claim is not based on the signature sheet alone. It is but one of the evidences of the joint and several obligation entered into by appellant and others. Under the section of the statute above referred to, all joint obligations are both joint and several. (*Messenger v. Wendell*, 211 Ill. App. 374). Appellee had a right to bring his action against all of the petitioners or against any one of them. This disposes of appellant's objection to the 1st instruction given on behalf of appellee.

Appellee's 4th instruction is not technically correct, but it is not so erroneous as to constitute reversible error. There was no error in the refusal of instructions.

Finally, the evidence does not support the claim that appellee did more work and occasioned more expense than was reasonable or necessary for the purpose for which he was employed. The drainage district had an area of 28 miles with 29 streams running through or into it. Such a proposition requires both time and skill. Appellee paid out for assistance and other necessary expenses, more than \$600. The verdict of the jury was for \$1100, leaving less than \$500 as compensation for his services. If there was any unnecessary work performed by appellee, the amount of the verdict made allowance for it. Our review of this case convinces us of appellant's liability.

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The contention of appellant that the signature sheet did not

reverse a joint and several obligation under Sec. 3 of Chapter 75,

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Appellee has both joint and several. (Messenger v. Wendell, 211 N.H.

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is not an erroneous as to constitute reversible error. There was no

Appellee made a proposition equities both time and skill. Appellee

more than \$500. The verdict is for the appellant, leaving less than \$500 as

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as of appellant's list

The judgment of the circuit court will be affirmed.

Judgment affirmed.

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION

PUBLISHED WEEKLY

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STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court at Ottawa, this 9th day of
April in the year of our Lord one thousand
nine hundred and twenty- six.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract Only -
1272
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the Second
District of the State of Illinois:

241 I.A. 634

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 16 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE SUPREME COURT,

Began and held at Ottawa, on Tuesday, the sixth day of

April, in the year of our Lord one thousand nine

hundred and twenty-six, within and for the Second

District of the State of Illinois: 241 I.A. 634

Present--The Hon. AUGUSTUS A. BARTLOW, Presiding Justice.

Hon. THOMAS M. LATT, Justice.

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JUSTUS L. JOHNSON, Clerk.

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APR 10 1926
The opinion of the court was filed in the
Clerk's office of said court, in the year and thousand
nineteen hundred and twenty-six.

John Bell, by his next friend
William Bell,

Appellee,

vs.

Appeal from Circuit Court

of La Salle County.

Chicago, Burlington & Quincy
Railroad Co. & American Bottle
Company, (American Bottle Co.),

Appellant.

241 I.A. 634

Jones P. J.

This is a suit instituted in 1916 by John Bell, by his next friend William Bell, who is also the father of the plaintiff, against Chicago, Burlington & Quincy Railroad Company and American Bottle Company on account of personal injuries received by plaintiff. The cause was not tried until January, 1925 when it resulted in a judgment upon a verdict in favor of the plaintiff and against the American Bottle Company for \$7000.00. An appeal was taken to this court.

In order to obtain a better understanding of the questions involved we will first set forth the locus in quo. The accident which caused the plaintiff's injuries occurred in the City of Streator. In 1874, Fawcett Plumb platted Villa Park Addition to said City. This addition contained a very considerable number of lots, blocks, streets and alleys. The plat of said addition was acknowledged by the proprietor before a deputy county surveyor of LaSalle County and was afterwards recorded in the Recorder's office of said county. It is admitted by the parties to this suit that the acknowledgment was not in accordance with the provisions of the statute in force at that time, and that the making of the plat and its recordation was not a statutory dedication but a common law offer to dedicate, and that to make the dedication effective, an acceptance thereof by the city was essential.

Among the streets platted is Adams Street, which is 75 feet in width and extends north and south through the entire length of the addition. This street is the one farthest west in the addition. The street farthest south and running east and west is Broadway, 66 feet in width. Along Broadway are the tracks of the Chicago, Burlington & Quincy Railroad. The northernmost tracks are the main tracks. Immediate-

Appeal from Circuit Court

of the City of St. Louis

241 U.S. 634

Appellee

Burlington & Quincy Railroad Company and American Bottle Co., Inc. (American Bottle Co.)

Appellant

This is a suit instituted in 1916 by John Bell, by his next of kin, William Bell, who is also the father of the plaintiff, against the Burlington & Quincy Railroad Company and American Bottle Company on account of personal injuries received by plaintiff. The

company for \$7000.00. An appeal was taken to this court.

In order to obtain a better understanding of the questions involved we will first set forth the facts in dispute. The accident which caused the plaintiff's injuries occurred in the city of St. Louis. In 1911, Tawest Kump platted Villa Park Addition to said city. This addition contained a very considerable number of lots, blocks, streets

and a depot. It is admitted by the parties in the Record's office of said county. It is admitted by the parties to this suit that the acknowledgment was not in accordance with the provisions of the statute in force at that time, and that the making of the plat and the recordation was not a statutory dedication but a mere offer to dedicate, and that to make the dedication effective, a record by the city was essential.

Among the streets platted in Adams Street, which is 75 feet

in the addition. The

is Broadway, 60 feet

the city.

2.

ly south of the main tracks are the switch tracks. Both of these sets of tracks intersected Adams Street at the time the plat was made. Immediately south of Broadway and ~~the~~ abutting Adams Street are Blocks 21 and 22--22 being on the west and 21 on the east side of Adams street. The south line of Lots 21 and 22 corresponds to the south line of the plat where Adams Street terminates. So it will be seen that Block 22 is located in the extreme southeast corner of the addition. Broadway is on the north and Adams Street is on the east of it. Immediately east of Adams Street is Block 21, consisting of six lots; and farther on is Jefferson Street; and Block 20 consisting of five lots is still farther east. Lots were sold in various parts of the addition and the City of Streator improved the streets north of the railroad tracks by grading, paving and installing street lights. Lots were also sold south of Broadway and the appellant, American Bottle Company, became the owner of Block 22, and on it is located one of the company's plants for the manufacture of glass bottles. Lot 21 is vacant. The topography of Blocks 21 and 22 and so much of Adams Street as is between the two blocks is rough and broken. A deep ravine formerly ran through them. The city has made no improvements upon that portion of Adams Stree, although the portion running north from the railroad tracks has been improved.

In order to load and unload cars at the plant of appellant, a spur was run from the above mentioned sidetrack in a southwesterly direction across Adams Street and into Block 22. The appellant company has erected a tight board fence six or eight feet high along the east line of Block 22 with a gate at the north end through which the said spur runs. On the date of the accident appellant received several carloads of coal which were run over the sidetrack from the spur to appellant's plant. According to the method of unloading employed, it required about one hour to unload each car. The unloading on this day was somewhat interrupted and while it began about seven o'clock in the morning, it had not been concluded at eleven o'clock, when the accident occurred. Within appellant's enclosure there was a fill where the

South of the main tracks are the switch tracks. Both of these sets of tracks intersected Adams Street at the time the city was laid out. The 22-23 being on the west and 21 on the east side of Adams Street. The south line of lots 21 and 22 corresponds to the south line of the Adams Street terminus. So it will be seen that Block 22 is located in the extreme southeast corner of the addition. Broadway is on the north and Adams Street is on the east of it. Immediately east of Adams Street is Block 21, consisting of six lots; and farther east is Jefferson Street, and Block 20 consisting of five lots is still farther east. Lots were sold in various parts of the addition and the city of St. Paul improved the streets north of the railroad tracks by paving, grading and installing street lights. Lots were also sold east of Broadway and the applicant, American Bottle Company, became the owner of Block 22, and on it is located one of the company's plants for the manufacture of glass bottles. Lot 21 is vacant. The topography of Blocks 21 and 22 and so much of Adams Street as is between the tracks is rough and broken. A deep ravine formerly ran through the block. The city has made no improvements upon that portion of Adams Street, although the portion running north from the railroad tracks has been improved. In order to load and unload cars at the plant of applicant, a spur was run from the above mentioned sidetrack in a southeasterly direction across Adams Street and into Block 22. The applicant company has erected a tight board fence six or eight feet high along the line of Block 22 with a gate at the north end through which the cars run. On the date of the accident applicant received several notices of coal which were run over the sidetrack from the spur to applicant's plant. According to the method of unloading employed, it required about one hour to unload each car. The unloading on this day was somewhat interrupted and while it began about seven o'clock in the morning, it was not completed until about one o'clock in the afternoon.

3.

tracks of the spur were laid. When a car had been unloaded, the rear wheels were "pinched" by a crow bar and the car was permitted to run back on the spur which was declined toward the street.

On June 9, 1916 the plaintiff was a boy approximately twelve years of age. He lived with his father north of the railroad tracks and sometime after ten o'clock he was engaged in cleaning the yard. He had a coal bucket which he filled with bottles, tin cans and other rubbish. He then started to take them from his home to a dump south of the railroad tracks and in the line of Adams Street. According to his story, the street was blocked with the coal cars above referred to and he undertook to go under the car nearest to the west side of the street. While he was under this car, another car which had been emptied of its coal was sent back by the appellant company in the manner we have described. It struck the car under which appellee was and put it in motion. Appellant, in an effort to save himself, grabbed a brake rod under the car but one of his legs was dragged against the rail by a wheel. Nearly all the flesh on the side and back of the right limb was torn loose from the thigh to the knee, and the leg was fractured at the knee. He was taken to a hospital where he was unconscious for several days. He remained in the hospital sixteen weeks, during which time dead flesh was removed on several occasions. Skin was taken from one leg and grafted on the other. The injury was dressed twice a day. He was compelled to use crutches for a considerable time after his discharge from the hospital. His injured leg was exhibited to the jury. It is nearly two inches shorter than the other leg and causes him to limp. It is scarred and disfigured, and somewhat distorted.

We were quite explicit in our description of the situation south of the railroad tracks, because, under the facts in this case, it is a question of major importance whether or not the accident occurred in a public street. It is charged in the declaration that it did, but appellant denies this averment, and insists that there never was an acceptance by the city of that portion of Adams Street which lies south of the railroad and between Blocks 21 and 22.

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4.

five counts. The counts are practically the same except that it is claimed by appellee that the third count charges wilfull negligence or misconduct. Appellant denies that wilfullness is charged by this count. This question becomes material only in the event that it is decided that Adams Street south of the railroad has not been accepted by the city and that appellee was a trespasser.

The claim that the offer of dedication was not accepted as to a portion of Adams Street is based upon two grounds; 1st, the proprietor making the offer withdrew it before the city accepted it; and 2nd, the city by its failure to improve that portion of the street and by its tacit permission to others to occupy it, declined to accept it. To support the contention that the proprietor withdrew the offer of dedication before it was accepted by the city, it was shown upon the trial that a conveyance was made by the proprietor Plumb to Edward ~~St~~ C. Modes of all of that part of Adams Street lying between Blocks 21 and 22; that on the day following, Modes conveyed the same property to William Ieuter. Afterwards Ieuter conveyed it to John C. Evans, and Evans conveyed it to the Streator Bottle and Glass Company, and on August 29, 1904 the Streator Bottle and Glass Company conveyed it to appellant, American Bottle Company.

There is no doubt that an order to dedicate may be withdrawn at any time prior to an acceptance. (Moore v. Chicago 251 Ill. 256; Rose v. Elizabethtown 275 Ill. 167; Russell v. C. & M. Electric Ry. Co. 205 Ill. 155.) And a sale of land, platted as a street, before any acceptance by a municipality, will constitute a revocation of the offer to dedicate. (Rose v. Village of Elizabethtown, supra; Birge v. City of Centralia 218 Ill. 503; Chicago v. Drexel 141 Ill. 89.) Public authorities are not required to accept an offer of dedication in its entirety. They may accept only a part of a street or streets contained in the offer and reject the rest. (Moore v. Chicago 251 Ill. 256; Gordon v. Chenoa, 166 Ill. 530; and C. M. & St. P. Ry. Co. v. Chicago 264 Ill. 24.)

It appears to have been conceded upon the trial that the offer of dedication of the entire plat located north of the railroad

The court has practically the same except that it is claimed by appellee that the third count charges willful negligence. Appellant denies that willfulness is charged by this count. This question becomes material only in the event that it is decided that Adams Street south of the railroad has not been accepted by the city and that appellee was a trespasser.

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There is no doubt that an order to dedicate may be withdrawn any time prior to an acceptance. (Moore v. Chicago 221 Ill. 222; Russell v. O. & M. Electric Ry. Co. 275 Ill. 127; And a sale of land, platted as a street, before any acceptance by a municipality, will constitute a dedication. (Moore v. Chicago 221 Ill. 222; Centralia 218 Ill. 503; Chicago v. Drexel 141 Ill. 89.) The authorities are not required to accept an offer of dedication in entirety. They may accept only a part of a street or street situated in the offer and reject the rest. (Moore v. Chicago 221 Ill. 222; Gordon v. Chicago, 126 Ill. 220; and O. M. & St. P. Ry. Co. 275 Ill. 127.)

5.

was accepted and that the common law dedication as to such portion became effective. The controversy as to acceptance concerns only that portion of Adams Street which lies between Blocks 21 and 22 and is 140 feet in length. The entire length of Adams Street, according to the plat, is 1651 feet. A number of persons bought lots with respect to the plat. Improvements were made by them and by the city in and along Adams Street, north of the railroad, long before the date of the conveyance by Plumb to Modes. It is a significant fact that the mesne conveyances from Plumb to the American Bottle Company all described the land attempted to be conveyed by reference to said plat, the description being uniformly "that part of Adams Street lying between Blocks Twenty-one (21) and Twenty-two (22) in Villa Park Addition to Streator." If an acceptance by the city of a portion of the plat constituted an acceptance of all of it, then the entire plat was accepted by the city before the date of Plumb's conveyance to Modes. We think it is a settled rule of law, that where there is an offer of a common law dedication and it is shown that acting under such offer, a city has improved some of the streets by putting in sewers, pavements or other betterments, it will be conclusively presumed that the city has elected to accept the offer in its entirety, unless it is further shown by clear and convincing proof that the city had at that time decided to reject and did reject certain portions of the offer. Where an offer by a common law dedication is made, the burden of showing its acceptance is upon him who asserts it. (Chicago v. Drexel, supra; Rose v. Elizabethtown, supra.) An acceptance may be shown in two ways, (1) by an express acceptance through some order, resolution or action of the public authorities entered of record, or (2) by acts of the public authorities which raise an implication of an acceptance. (Hilmer Co. v. Behr, 264 Ill. 568; C. M. & St. P. Ry. Co. v. Chicago, supra.) If the first method is employed the record will speak for itself as to whether or not any portion of the plat has been rejected. If the second method is employed and the proof shows an acceptance of any part of the plat such acceptance will be construed to apply to the whole plat in the absence of proof that it was not so accepted. No part of the plat under such circumstances will be deemed to have been

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part of the plat under such circumstances will be deemed to have been

6.

rejected unless the proof of the rejection is unequivocal. Therefore when it is shown that an offer of dedication has been accepted as to a portion of the plat, the burden of showing that the acceptance does not apply to the entire plat is upon the one who asserts it. (Kimball v. Chicago 253 Ill. 105; Dewey v. Chicago 274 Ill. 268; Consumers Co. v. Chicago 268 Ill. 113, 131.) In Kimball v. Chicago, supra, it was sought to restrain the city from interfering with the complainants' possession of a certain strip of land which they claimed to own. The Court held that a proprietor may withdraw an offer to dedicate a street or part thereof at any time before the offer is accepted, notwithstanding the sale of lots in the sub-division according to the plat. But where it appears that the principal streets and alleys have been accepted by the municipality, the presumption then obtains that all the streets and alleys of the sub-division have been accepted unless there is something which shows the acceptance to have been limited.

There is at least a suggestion in appellant's brief that the rule laid down in the Kimball case has been modified by the opinion in C. M. & St. P. Ry. Co. v. Chicago, supra, but we do not think there is any conflict in the opinions. In the last mentioned case, Wright and Webster platted a tract of land outside of the corporate limits of the City of Chicago. The city, of course, was not in a position to accept or reject the offer of dedication. Private individuals took possession of the property under claim of ownership and occupied it continuously and adversely for more than thirty years thereafter. In 1869 the legislature annexed this sub-division to the city of Chicago and in 1911 the city took steps to open up some of the streets; whereupon certain of those in possession under claim of ownership, filed a bill to restrain the city from interfering with their possession, and the Supreme Court held that the city had never done anything sufficient to indicate an intention to accept the offer of dedication. The opinion of the court expressly approved Kimball v. Chicago, supra, as announcing a correct rule.

In Consumers Co. v. Chicago 268 Ill. 113, 132, it is said

Therefore, I. The opinion of the court in the case of Dewey v. Chicago, 224 Ill. 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

7.

"In the absence of a contrary intention being shown, we have held acceptance by a municipality of the principal portion or nearly all of the streets of the sub-division raises the presumption of acceptance of it of all of the streets in the sub-division (citing cases), also, that evidence of the acceptance of streets by a city is found in the affirmative act of taking possession thereof for the purpose of placing therein water mains or sewers."

The evidence in the instant case shows that the city of Streator improved nearly every street in the sub-division and much of it was done prior to Modes' conveyance. This proof raises a presumption of acceptance of the plat as a whole and unless that presumption has been overcome by clear proof of a rejection of the south 140 feet of Adams Street, it must be held that said street is a public street throughout its entire length as shown upon the plat. There was no unequivocal act shown by the record indicating that the city desired to accept a portion of Adams Street and to reject the rest. It is true that it improved all of that portion of the street lying north of the railroad and did not improve the short portion which is south of it. But to our minds this is not an indication of a settled determination to reject the portion of the street it did not improve. That portion was located in a part of the town which was sparsely settled. There were very few residences south of the tracks. The only buildings in that locality were three small frame structures, all of which were situated upon or adjacent to the strip in question. One was used as a saloon, another as a barber shop and the third as a boarding house. These buildings were afterwards removed. Because of the branch or stream which crossed the street not having been bridged, there was little vehicle travel upon it although the evidence shows there was some. Block 21 was not occupied or fenced. Employees of the Bottle Company came from the plant, traversed the street and went in whatever direction suited their conveniences. The testimony of the witnesses showed that ~~there~~ there was a common understanding among those who lived in that

With the absence of a contrary intention being shown, we have held acceptance by a municipality of the principal portion or nearly all of the streets of the sub-division raises the presumption of acceptance of all of the streets in the sub-division (citing cases), also, as evidence of the acceptance of streets by a city is found in the following out of taking possession thereof for the purpose of placing therein water mains or sewers."

The evidence in the instant case shows that the city of Superior improved nearly every street in the sub-division and much of it was done prior to 1888, conveyances. This proof raises a presumption of acceptance of the plat as a whole and raises that presumption and is overcome by clear proof of a rejection of the south 140 feet of Adams Street. It must be held that said street is a public street. It is its entire length as shown upon the plat. There was no historical act shown by the record indicating that the city desired to accept a portion of Adams Street and to reject the rest. It is true that it improved all of that portion of the street lying north of the railroad and did not improve the short portion which is south of it. But our minds this is not an indication of a settled determination to reject the portion of the street it did not improve. That portion was located in a part of the town which was sparsely settled. There were very few residences south of the tracks. The only buildings in that locality were three small frame structures, all of which were located upon or adjacent to the strip in question. One was used as a saloon, another as a barber shop and the third as a boarding house. These buildings were afterwards removed. Because of the branch or stream that crossed the street it was not improved. The evidence shows that while travel upon it although the evidence shows there was some. It was not occupied or fenced. Employees of the Bottle Company came from the plant, traversed the street and went in whatever direction they desired their conveyances. The testimony of the witnesses showed that there was a common understanding among those who lived in that

vicinity that the strip was a public street and that it was universally known as Adams Street. We fail to find any substantial evidence even tending to prove a rejection of this strip, and much less are we able to say that the proof is clear that the strip was in fact rejected by the municipality.

It now having been determined by us that the place where appellee received his injuries is in a public street, we must next determine whether such injuries were occasioned by the negligence of appellant while appellee was in the exercise of due care and caution for his own safety. It needs no discussion to show that it was a negligent act for appellant to put a car in motion and send it out into a public street without guards and without using any care to prevent injury to one who might be in the street. We are of the opinion that appellee was in the exercise of ordinary care at the time of the accident. If his testimony and that of other witnesses who corroborated him are to be believed then Adams Street was blocked by the cars which appellant had caused to be placed across it. We held in the case of *Lerette v. Davis and C.B. & Q. R.R. Co.* 225 Ill. App. 93 that a person who is rightfully traveling along a street is not guilty of contributory negligence when he undertakes to pass between cars which block a street, if he was under the belief, and had no warning, that the cars might be moved while he was in the act of going between them. This case was afterwards affirmed. (*Lerette v. The Director General of Railroads, et al* 306 Ill. 548.)

It is said that the judgment is excessive. Without regard to the question of wilfulness, we think that the damages awarded are not excessive in view of the suffering undergone and the injuries sustained by appellee as hereinbefore detailed.

It is the theory of the appellant that appellee was injured west of Adams Street while he was in an endeavor to take coal from the company, but the evidence largely preponderates in favor of appellee's version that he was rightfully in the street. There was no error in the court's refusal to admit testimony to the effect that it was the intention of the appellant to extend its switch through the north fence so as to connect with the main line of the railroad. It is immaterial

what appellant's intention was, in determining the question of an acceptance of the offer of dedication. It was only pertinent to know what the intention of the city was in regard to that question.

We believe that the testimony of William Bell as to vehicles using the south part of Adams Street since the date of the accident should not have been admitted but the error is wholly insufficient to cause a reversal of this case.

Proof was made that no taxes have been assessed and levied against the American Bottle Company or any one else on account of this strip since 1876. The fact that the strip was not listed for taxation is not conclusive of the question of acceptance of the offer of dedication, but it is an evidentiary fact from which it may be construed that appellant regarded the strip as public property. (Poole v. City of Lake Forest 238 Ill. 305.) It is further objected by appellant that it was improper for appellee to introduce deeds showing conveyances of other lots and blocks in the sub-division. We think these deeds were competent upon the question of the alleged revocation or withdrawal of the offer of dedication by Plumb. They showed that he made many conveyances of property within the sub-division using descriptions referable to the plat, all of which conveyances were executed and delivered long before he made the deed to Modes.

Appellee's instructions 1, 7 and 8 are complained of. The criticism of instruction 1 is unfounded. Instruction 7 should not have referred to the declaration. Neither should instruction 8 have referred to it or to the ad damnum. Instructions referring to the declaration without stating what the declaration charges have been repeatedly condemned but have never been held to be reversible error except in the extreme cases. There is no direct reference to the ad damnum but we cannot commend the instruction. It is evident no harm resulted to appellant from it, because the damages assessed were less than one-half of the amount of the ad damnum. The court modified appellant's instructions 10, 13, and 14. The appellant was not prejudiced by these modifications, even though it may be conceded

the question of an appellant's intention was, in the question of an
intention of the offer of dedication. It was only pertinent to
the question of the intention of the city was in regard to that question.

We believe that the testimony of William Bell as to
the value of the south part of Adams Street since the date of the
dedication should not have been admitted but the error is wholly

insufficient to cause a reversal of this case.

Proof was made that no taxes have been assessed and paid
by the American Bottle Company or any one else on account of this
since 1876. The fact that the strip was not listed for taxation
is conclusive of the question of acceptance of the offer of dedi-
cation, but it is an evidentiary fact from which it may be construed
that the appellant regarded the strip as public property. (Poole v.
The Forest 238 Ill. 308.) It is further objected by appellant
that it was improper for appellee to introduce deeds showing conveyances
to the land and blocks in the sub-division. We think these deeds
relevant upon the question of the alleged dedication or with-
drawal of the offer of dedication by Plumb. They showed that no deeds
of property within the sub-division using descriptions
referred to the plat, all of which conveyances were executed and
recorded long before he made the deed to Moses.

Appellee's instructions 7 and 8 are complained of.
Instruction 7 is unfounded. Instruction 8 has
been referred to the declaration. Neither should instruction 8 have
been referred to it or to the ad damnum. Instructions referring to the
ad damnum without stating what the declaration charges have been
condemned but have never been held to be reversible error
in the extreme cases. There is no direct reference to the ad
damnum in the instruction. It is evident no harm
was done to appellant from it, because the damages assessed were less
than half of the amount of the ad damnum. The court modified
instructions 10, 12, and 14. The appellant was not

10.

that the instructions ought to have been given as tendered. The modifications consisted of striking out certain words from each instruction. But an examination of all the instructions given in the case discloses that appellant's theory of the law applicable to the facts was fully covered by the court in its series of instructions.

We believe that substantial justice has been attained in this case and that the judgment should be affirmed.

Judgment affirmed.

the instructions ought to have been given as tendered. The instructions consisted of striking out certain words from each instruction. But an examination of all the instructions given in the case discloses that appellant's theory of the law applicable to the case was fully covered by the court in its series of instructions. We believe that substantial justice has been obtained in this case and that the judgment should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 19th day of
april in the year of our Lord one thousand
nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

57-20-1
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the Second
District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk. 241 I.A. 635

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 16 1926, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE SUPREME COURT

Began and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the second
District of the State of Illinois:

Present: The Hon. AUGUSTUS A. BANTON, Presiding Justice.

Hon. THOMAS M. JEFF, Justice.

Hon. ROBERT T. JONES, Justice.

JUSTUS T. JOHNSON, Clerk. 241 I.A. 685

H. J. WILSON, Sheriff.

ON IT REMONSTRATED, that afterwards, to-wit: On
APR 12 1926, the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Lillie M. Wilde,
Appellant,

vs.

Balz Garman,
Appellee.

Appeal from Circuit
Court of Peoria County.

241 T.A. 635

Jones P.J.

This is an appeal from a judgment in favor of appellee in a suit instituted in the circuit court of Peoria County by appellant against appellee to recover damages received in an automobile accident. There are five counts in the declaration, the first of which charges general negligence in the operation of appellee's car. The second count charges that appellee was driving his car at a greater rate of speed than was reasonable and proper having regard to the traffic and use of the way. This count is apparently based on Section 22 of the Motor Vehicle Act of 1919. The third charges substantially the same facts as the first count and is based upon the statute in reference to driving a car around a corner or curve where view of the traffic is obstructed. The fourth is based upon an alleged unlawful failure and refusal of appellee to give to the car in which appellant was riding, the right of way and is based on Section 33 of the Motor Vehicle Act. The fifth count is substantially the same as the fourth count. Each count alleges that appellant was in the exercise of due care and caution for her own safety.

The injury occurred on August 25th, 1924, on the hard road known as Route 24. Appellant and her daughter Merida Wilde were riding in a Hupmobile five passenger open touring car, belonging to appellant's husband. They were traveling north on the hard road between Springfield and Peoria. Appellant's daughter was driving the car and appellant was sitting on the ~~front~~ front seat at the right of the driver. It is insisted by appellant that her daughter had the exclusive management of the car. The accident happened at a point where a dirt road coming from the west, known as the Manito road, terminates at the hard road, about three miles north of Green Valley. The hard road at the place of the accident was sixteen feet wide, level and straight for about a mile

Appeal from Circuit Court of Peoria County.

Appellant, M. W. Wilde,

2411 A. 685

Appellee, J. G. German.

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The injury occurred on August 25th, 1924, on the hard road between Route 24. Appellant and her daughter Mervida Wilde were riding in a mobile five passenger open touring car, belonging to appellant. They were traveling north on the hard road between Springfield and Peoria. Appellant's daughter was driving the car and appellant was sitting on the front seat at the right of the driver. It is alleged by appellant that her daughter had the exclusive management of the car. The accident happened at a point where a dirt road coming from the west, known as the Lantto road, terminates at the hard road, about three miles north of Green Valley. The hard road at the place of accident was sixteen feet wide, level and straight for about a

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to the south and more than a mile to the north, and ran directly north and south. It was built upon an embankment two and a half feet or more higher than the land immediately to the west. On both the east and west sides of the hard road the embankment extended out from the outer edges of the concrete pavement about seven feet, and was of sufficient width for a car to be driven upon. Immediately east of the embankment there was a ditch about five and one-half feet deep, and there was another ditch on the west side of the road about two and one-half feet deep. The dirt road connected with the hard road in the shape of a "Y", and at the point of intersection the dirt road was about sixty feet wide. There were corn fields on each side of the dirt road, and the east fence of the corn field south of the dirt road was about 25 feet from the west line of the concrete pavement. Some bundles of oats and wheat had been taken out of the field east of the hard road on account of water and set along the embankment on the east side of the hard road to dry.

Appellant contends that she was riding in the car with her daughter traveling north, at about 20 to 25 miles per hour; that as they approached the intersection, appellee came from the west and drove his car in front of them at a speed of 25 miles an hour; that in doing so he placed himself and his car in such a position that the car in which she was riding struck his car on the right hand rear side; and that her car turned to the left to avoid a collision and ran into the ditch. Appellant claims to have been injured by being thrown through the windshield of the car in which she was riding and that her knee-cap was broken.

She further contends that because her car was traveling north and the car of appellee was traveling east, her car had the right of way, and that appellee's negligence in failing to observe the law in that respect occasioned the injury. But the weight of the evidence seems to show that appellee reached the intersection first and had turned north on the east side of the hard road when his car was struck by appellant's car which was running from 40 to 60 miles an hour; that appellee's car did not exceed 6 to 8 miles an hour when it turned onto the hard road and was not running over 20 miles an hour at the time of

to the south and more than a mile to the north, and ran directly north and south. It was built upon an embankment two and a half feet or more higher than the land immediately to the west. On both the east and west sides of the hard road the embankment extended out from the outer edges of the concrete pavement about seven feet, and was of sufficient width for a car to be driven upon. Immediately east of the embankment there was a ditch about five and one-half feet deep, and there was another ditch on the west side of the road about two and one-half feet deep. The dirt road connected with the hard road in the shape of a "Y", and at the point of intersection the dirt road was about sixty feet wide. There were corn fields on each side of the dirt road, and the east fence of the concrete pavement. Some bundles of oats and wheat had been taken out of the field east of the hard road on account of water and set along the embankment on the east side of the hard road to dry.

Appellant contends that she was riding in the car with her car traveling north, at about 20 to 25 miles per hour; that as they approached the intersection, appellee came from the west and drove his car in front of them at a speed of 25 miles an hour; that in doing so he placed himself and his car in such a position that the car in which she was riding struck his car on the right hand rear side; and that her car turned to the left to avoid a collision and ran into the ditch. Appellant claims to have been injured by being thrown through the windshield of the car in which she was riding and that her knee-cap was

The further contends that because her car was traveling north and her car of appellee was traveling east, her car had the right of way, and that appellee's negligence in failing to observe the law in that respect occasioned the injury. But the weight of the evidence seems to show that appellee reached the intersection first and had turned north on the east side of the hard road when his car was struck by appellant's car which was running from 40 to 60 miles an hour; that appellee's car did not exceed 6 to 8 miles an hour when it turned onto the hard road and was not running over 20 miles an hour at the time it

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the accident. It appears from the evidence that when appellee's car started to turn onto the hard road, appellant's car was a considerable distance south of the intersection, and as it approached appellee, it started to pass on the left of appellee but its driver saw the car of the witness Lohnes approaching from the north and discovered she could not pass appellee's car without hitting the Lohnes car. She applied her brakes and turned to the right, and attempted to pass appellee on the right-hand side. On account of the shocks of wheat and oats on that side she was unable to do it, and thus the accident happened. The collision occurred a considerable distance north of the north line of the intersection. One witness who measured it testified that it was 68 feet from the center of the intersection to where appellant's car left the road to the ditch. One of appellant's witnesses who was connected with the company which repaired appellee's car body, testified that the injury to appellee's car was 90% from the rear and 10% from the side, and another of her witnesses who was connected with the same company testified that the damage was on the right rear corner of the body, about 75% on the back of the car and the remaining 25% on the corner. From a consideration of this testimony and that concerning the tracks made by appellant's car on the embankment to the right of the pavement, it is apparent that appellee's car was traveling north on the east side of the road when it was struck. The witness Lohnes testified that he had seen the car in which appellant was riding coming at a high rate of speed, and to avoid its running into him he drove his car off the pavement onto the ground as far as he could and stopped. Three disinterested witnesses testified to hearing appellant or her daughter who drove the car, admit immediately after the accident that it was their fault and that they were driving too fast. Two other witnesses also testified to a similar admission by the daughter shortly after the accident. The daughter denied having made any such admission and two witnesses were permitted to contradict her. Appellant complains that the court erred in the admission of the testimony of these two witnesses without limiting it to the purpose of impeachment. Appellant asked no instruction to

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attempted to turn onto the hard road, appellee's car was a considerable
distance south of the intersection, and as it approached appellee, it
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car hit the road to the ditch. One of appellee's witnesses who was
connected with the company which repaired appellee's car body, testi-
fied that the injury to appellee's car was 30% from the rear and 10%
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of the body, about 75% on the back of the car and the remaining 25%
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4.

that effect. Failure to so instruct the jury is not assignable as error unless the court is requested so to charge. (Bird v. Bird 218 Ill. 158 p. 161; 38 Cyc. 1756.)

Appellant claims that she was not in control of the car in which she was riding, and therefore no negligence can be imputed to her. Under the facts as disclosed by the evidence she was riding in the front seat with the driver of the car; she was in a position to see and observe just as much as was the driver, and it was incumbent upon her to establish the fact that she was in the exercise of due care and caution for her own safety. The evidence tends to show that the car in which she was riding was being driven at a high and dangerous rate of speed. A disinterested witness testified that it was going 50 miles an hour at a point a quarter of a mile south of the intersection and that it had not slackened its speed but went by the intersection like a flash. There is no evidence in the record that appellant did or attempted to do anything to prevent such speed, or that she even called the driver's attention to it. If a person riding in a vehicle knows that the driver is negligent and makes no effort to prevent the negligence, he cannot recover in the event of an injury, for in such case the negligence is his own and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge. (Flynn v. Chicago City Ry. Co. 250 Ill. 460) It is the duty of a mere passenger in a vehicle, where he has an opportunity to learn of danger and avoid it, to warn the driver of the vehicle of such danger. The passenger has no right, because some one else is driving the vehicle, to omit reasonable and prudent efforts on his part to avoid the danger. (Pienta v. Chicago City Ry. Co. 284 Ill. 246) To the same effect are the cases of Opp v. Fryor 294 Ill. 538; Pence v. Hines 221 Ill. App. 584; and Grifenhan v. Chicago Rys. Co. 299 Ill. 590.) Our conclusion from all the evidence in this record is that the accident did not happen through the fault or negligence of appellee and that the jury was warranted in finding as

effect. Failure to so instruct the jury is not reversible as
unless the court is requested so to charge. (Bird v. Bird, 218

Appellant claims that she was not in control of the car in
and she was riding, and therefore no negligence can be imputed to

caution for her own safety. The evidence tends to show that the
in which she was riding was being driven at a high and dangerous
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at an attempt to do anything to prevent such speed, or that she even
the driver's attention to it. If a person riding in a vehicle

the negligence is his own and not simply that of the driver.

other, but must use care proportionate to the danger which
convey knowledge. (Flynn v. Chicago City Ry. Co. 230 Ill.
It is the duty of a mere passenger in a vehicle, where he has

is driving the vehicle, to omit reasonable and prudent efforts
to avoid the danger. (Pienke v. Chicago City Ry. Co.

To the same effect see the same case and the same result in
ence v. Hines 231 Ill. App. 584; and Gritchen v. Chicago

Our complaint is from all the in this
that the accident did not happen through the fault of
of appellee and that the jury was warranted in finding

5.

it did. In our opinion the accident did not happen at the road intersection, but north of it; hence; the citations of authority by appellant pertaining to the right of way of vehicles at intersections have no application to the facts in this record.

The fifth instruction given for appellee told the jury "that if you believe that the evidence on the issue of negligence involved in this case is equally balanced, and that the plaintiff has failed to prove her case by the greater weight of all the evidence you should return a verdict finding the defendant not guilty." Similar instructions have been repeatedly approved. (Chicago Transit Co. v. Campbell 110 Ill. App. 366.) Instruction number nine is not subject to the criticism suggested. Nor does instruction number twelve assume the car of appellant was being carelessly driven; that question is left to the jury to determine. Neither does it call attention to particular facts. It is not the law, as apparently insisted, upon by appellant in connection with appellee's instruction number seventeen, that where a passenger knows the facts, there is no duty upon him to do anything to protect himself against a driver's negligence. Appellee's eighteenth instruction, under the facts in this case, was not erroneous. (Barnes v. Barnett, 184 Iowa 936; Lee v. Pesterfield 77 Okla. 317; Bromley v. Dilworth 274 Fed. 267; Ray v. Brannan 196 Ala. 113; Whitelaw v. McGilliard 179 Cal. 349; Ward v. Gildea 44 Cal. 380.)

Appellant's first refused instruction is not a correct statement of the law under Grifenhan v. Chicago Rys. Co., Supra. Her second refused instruction is apparently an attempt to state the provisions of Sec. 22, Chap. 121, Rev. Stat., but is inaccurate in several respects. It omits the provision relating to turning corners, and states that the statute limits the speed of motor vehicles to eight miles an hour where the operator's view of the road traffic is obstructed. The statute only makes a speed in excess of eight miles an hour prima facie evidence of unreasonable speed. There was no error in refusing these instruction.

In our opinion the answer did not happen at the road intersection, but north of it; hence, no citations of authority are applicable to the right of way of vehicles at intersections. There is no application to the facts in this record.

The fifth instruction given for appellee told the jury that if you believe that the evidence on the issue of negligence is equally balanced, and that the plaintiff failed to prove her case by the greater weight of all the evidence, you should return a verdict finding the defendant not guilty."

Other instructions have been repeatedly approved. (Chicago Transit Co. v. Campbell, 110 Ill. App. 386.) Instruction number nine is not subject to the criticism suggested. Nor does instruction number ten assume the car of appellant was being carelessly driven; that is left to the jury.

Instruction to particular facts. It is not the law, as apparently stated, that a passenger is under a duty to protect himself against a driver's

negligence. Appellee's eighteenth instruction, under the facts in this case, was not erroneous. (Barnes v. Barnett, 184 Iowa 926; Lee v. Westfield 77 Okla. 317; Bromley v. Dilworth 274 Neb. 237; Ray v. Newman 196 Ala. 113; Whitehead v. McGalliard 179 Cal. 349; Ward v. Illinois 44 Cal. 380.)

Appellant's first refusal instruction is not a correct statement of the law under Griffen v. Chicago Ry. Co., 309 Ill. 2d 100. Her second refusal instruction is apparently an attempt to state the provisions of Ill. Stat., Chap. 121, Rev. Stat., but is inaccurate in several respects.

It omits the provision relating to turning corners, and states that the statute limits the speed of motor vehicles to eight miles an hour. The operator's view of the road traffic is obstructed. The statute only makes a speed in excess of eight miles an hour prima facie evidence of unreasonable speed. There was no error in refusing these

6.

Complaint is also made that the court erred in modifying several of appellant's offered instructions. We have examined all of the modified instructions complained of and find no reversible error in any of such modifications. No substantial error was committed by the court in admitting or excluding evidence. Not every error appearing in a record will justify a reversal. From the facts disclosed by the testimony in this case we do not think any of the errors assigned would have affected the result or that another trial would result differently. In such case the judgment of the trial court should be affirmed. (People v. Weir 295 Ill. 268.)

Judgment affirmed.

Complaint is also made that the court erred in modifying several

of the defendant's offered instructions. We have examined all of the

offered instructions complained of and find no reversible error in
any such modifications. No substantial error was committed by the

court in admitting or excluding evidence. Not every error appearing

on a record will justify a reversal. From the facts disclosed by

the testimony in this case we do not think any of the errors assigned

could have affected the result or that another trial would result

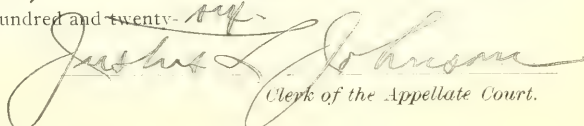
therein. In such case the judgment of the trial court should be

affirmed. (People v. Weir 225 Ill. 228.)

Judgment affirmed.

STATE OF ILLINOIS, ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 19th day of
april in the year of our Lord one thousand
nine hundred and twenty 04.


Clerk of the Appellate Court.

JUSTUS L. JOHNSON, Clerk of the Appellate Court,
said Seal and District of the State of Illinois, and keeper of the Records and Seal thereof,
I Appellate Court in

In Testimony Whereof,
said Appellate Court in Ottawa, this
in the year of our Lord one thousand

Abstracts Book 2
537
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the Second
District of the State of Illinois:

241 I.A. 635

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 16 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AS A TERM OF THE APPELLATE COURT.

Began and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the Second
District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PANTLOW, Presiding Justice.

Hon. THOMAS H. LEWIS, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

H. J. WELTER, Sheriff.

APR 10 1926
The opinion of the Court was filed in the
clerk's office of said Court, in the words and figures
as follows:

Joe Bombassaro,

Appellee,

v.

Appeal from the Circuit
Court of Kane County.

The Empire Auto Insurance
Association,

Appellant.

241 I.A. 635

Jones, P. J.

This is an appeal from a judgment of the circuit court of Kane County in favor of appellee who was plaintiff and against appellant, the defendant, for \$350. and costs. The action was in debt on a policy of insurance on an automobile against loss by fire, etc. The plea was nil debit.

Bombassaro was a resident of Joliet. He purchased from the Minooka Auto Company a used Ford automobile for \$375 and paid an additional \$25 as a "carrying charge." This charge was intended to cover interest on deferred payments, insurance on the automobile and expenses of recording a chattel mortgage from the buyer to the seller. The plaintiff paid \$100 down and agreed to pay \$30 a month on the remainder of the purchase price. The Minooka Auto Company was owned by F. L. Wright, who was also the owner of an agency in Monmouth and one in Yorkville. The business at Minooka was conducted by a man by the name of Gaard. Wright was engaged in the sale of automobiles on a deferred payment plan. The purchasers on that plan were required to pay a "carrying charge" for insurance etc. as above mentioned. W. O. Guyton, attorney in fact for the defendant Insurance Association, had a conversation with Wright in regard to placing the insurance with the defendant Association. Arrangements were made between them whereby Wright was to make out applications upon blanks left with him for that purpose by Guyton, and to collect the premiums. Wright testified he was to receive a commission on all premiums obtained through him. But Guyton claimed that Wright was to receive nothing but a reduced rate on insurance. Gaard filled out the application in this case. Bombassaro signed it and it was forwarded to appellant. A policy was issued in

de Bombasato,

Appellee,

Appeal from the Circuit
Court of Kane County.

Appellant.

241 E.A.

This is an appeal from a judgment of the circuit court of Kane County in favor of appellee who was plaintiff and against appellant, defendant, for \$860. and costs. The action was in debt on a policy of insurance on an automobile against loss by fire, etc. The fire was caused by a defective spark plug. The automobile was purchased from the defendant into company a used Ford automobile for \$275 and said an installment plan. The defendant agreed to pay \$30 a month on the remaining balance of the purchase price. The defendant also owned by E. J. Wright, who was also the owner of an agency in Hornsby and one in the business at Minnoka was conducted by a man by the name of Wright. Wright was engaged in the sale of automobiles on a deferred payment plan. The purchasers on that plan were required to pay a certain amount for insurance etc. in some instances. In fact for the defendant Insurance Association, had a contract with Wright in regard to placing the insurance with the defendant association. Arrangements were made between them whereby Wright was to make out applications upon blanks left with him for that purpose and to collect the premiums. Wright testified he was to receive a commission on all premiums obtained through him. But Guyton testified that Wright was to receive nothing but a reduced rate on the policy and it was forwarded to appellant. A policy was issued in

favor of Bombassaro and payable to "Yorkville Motor Company" (it being one of Wright's agencies) as its interests may appear. It was sent by the Association direct to Wright. It is obvious that in obtaining the policy of insurance, Wright was the agent of appellant.

On or about January 1, 1924, Bombassaro's home and garage were burned. The automobile was also destroyed by the fire. The loss was reported to Wright, who directed Clarence W. Clark, one of his employees and successor to Gaard, as manager of the Minooka Auto Company, to go to Joliet and investigate the fire. Clark made the investigation immediately and thereupon sent a telegram to the appellant company notifying it of the loss. Shortly after he had sent this telegram it occurred to him that he had not informed the Association of the whereabouts of the fire. He then sent another telegram giving the Association full particulars. Wright testified that he called Guyton over the 'phone and informed him of the loss. Just what was said in this conversation we are unable to gather from the abstract, but it seems that there was some controversy between the Association and Wright concerning unpaid premiums. At any rate nothing was done by the Association to adjust the loss and this suit was brought.

It is the contention of appellant that in an action of debt upon a simple contract, such as the insurance policy in this case, a plea of nil debit put in issue every material allegation of the declaration; that the declaration averred appellant, after the loss had been sustained, agreed to pay appellee the amount of the loss; and that the record contains no proof of such agreement and therefore appellee has failed to prove his case as set forth in the declaration and was not entitled to a judgment. We are unable to see the force of this contention. Proof of the issuance of a policy for a valuable consideration and subsequent loss and damage by fire raises an implication of law of a promise to pay, and suit may be brought anytime thereafter, unless the contract contains requirements which must be fulfilled as a condition precedent to a right of action. Under the pleadings and the proof in this case it was not essential to a recovery for appellee to prove that appellant expressly promised appellee after the fire, to pay the

every of Bombassero and payable to "Yorkville Motor Company" (it being
one of Wright's agencies) as its interests may appear. It was sent
by the Association direct to Wright. It is obvious that in obtaining
a policy of insurance, Wright was the agent of appellant.
On or about January 1, 1924, Bombassero's home and garage were
destroyed. The automobile was also destroyed by the fire. The loss was
estimated to Wright, who directed Clarence W. Clark, one of his employees
and successor to Beard, as manager of the Minnesota Auto Company, to go
to the fire and investigate the fire. Clark made the investigation
and reported to Wright. Shortly after he had sent this telegram to
Wright, he then sent another telegram giving the Association
facts of the fire. Wright testified that he called Guyton over the
phone and informed him of the loss. That what was said in this conver-
sation we are unable to gather from the abstract, but it seems that
there was some controversy between the Association and Wright concerning
the amount of the loss. At any rate nothing was done by the Association to
pay the loss and this suit was brought.
It is the contention of appellant that in an action of debt
there is no simple contract, such as the insurance policy in this case, a
loss of all debt, but in issue every material allegation of the declara-
tion, and the Association is not liable for the loss, and that the
defendant, agreed to pay appellee the amount of the loss; and that the
declaration contains no proof of such agreement and therefore appellee has
failed to prove his case. We are unable to see the force of this conten-
tion. Proof of the issuance of a policy for a valuable consideration
and a subsequent loss and damage by fire raises an implication of law of
a contract to pay, and will not be defeated by a declaration which
contains no right of action. Under the pleadings and the proof in
this case it was not essential to a recovery for appellee to prove
that appellant expressly promised appellee after the fire, to pay the

3.

the loss. The suit is on the policy and is not predicated upon any subsequent oral promise to pay a stipulated sum.

The policy provides that the subscriber or insured shall give the attorney in fact immediate written notice of loss; that the Association shall have a reasonable time and opportunity to examine the damaged automobile; and that the amount of loss or damage shall be ascertained by the subscriber and the attorney in fact, but if they differ, then by appraisers.

Guyton was attorney in fact for the Association and appellee did not give him a written notice of the loss, but he did receive notice orally; and written notice was also given to the Association by telegrams. There is no doubt that a policy provision requiring an insured to give written notice to a particular officer of an insurance company is a valid requirement, and that notice given to a different agent or officer is not in compliance with the provisions of the policy. (Patrick v. Farmers' Ins. Co. 43 N.H. 621; Cornell v. M. F. & N. Ins. Co. 18 Wis. 387.) But such a condition is for the express benefit of the insurer, and it is a settled rule of pleading that a failure to comply with such requirement must be set up by a special plea. Unless that is done, a failure to give written notice to the particular officer designated cannot be relied upon as a defense under the general issue. (Briggs v. Bankers Accident Ins. Co. 214 Ill. App. 181; Ford v. Union Auto Ind. Ass'n. 229 Ill. App. 264) Under these cases, appellant was not in a position to deny liability on that ground.

It is further insisted that the requirement concerning the ascertainment of loss is a mandatory provision and that appellee had no right of action until the amount of loss had been agreed upon between him and the attorney in fact, or, in the event of a disagreement between them, then by an ascertainment of loss by arbitrators. The policy does not impose a duty upon an insured to initiate a movement either with the attorney in fact or among arbitrators to determine the amount of loss. Under the terms of this particular policy the duty to initiate such a movement was upon the Association rather than upon the insured, under the established legal doctrine that policies of indemnity shall be most favorably

The suit is on the policy and is not predicated upon any

contract or promise to pay a stipulated sum.

The policy provides that the subscriber or insured shall give

attorney in fact immediate written notice of loss; that the association

shall have a reasonable time and opportunity to examine the damaged

property; and that the amount of loss or damage shall be ascertained

by the subscriber and the attorney in fact, but if they differ, then by

arbitrators.

Guyton was attorney in fact for the Association and appellee

did not give him a written notice of the loss, but he did receive

notice orally; and written notice was also given to the Association by

appellee. There is no doubt that a policy provision requiring an

insured to give written notice to a particular officer of an insurance

company is a valid requirement, and that notice given to a different

officer is not in compliance with the provisions of the policy.

See *Union v. Farmers' Ins. Co.*, 48 N.H. 681; *Cornell v. M. F. & W. Ins.*

Co., 101 N.H. 387. But such a condition is for the express benefit of the

insurer, and it is a settled rule of pleading that a failure to comply

with such requirement must be set up by a special plea. Unless that is

done, a failure to give written notice to the particular officer designated

cannot be relied upon as a defense under the general issue. (*Bridge v.*

Accident Ins. Co., 214 Ill. App. 181; *Ford v. Union Auto Ind. Ass'n.*

Ill. App. 264) Under these cases, appellant was not in a position to

show inability on that ground.

It is further insisted that the requirement concerning the

ascertainment of loss is a mandatory provision and that appellee had no

action until the amount of loss had been agreed upon between

the insured and the attorney in fact, or, in the event of a disagreement between

them, by an ascertainment of loss by arbitrators. The policy does

not impose a duty upon an insured to initiate a movement either with the

insurer or with the arbitrators.

Under the terms of this particular policy the duty to initiate such a

movement was upon the Association rather than upon the insured, under the

well established legal doctrine that policies of indemnity shall be most favorably

4.

construed in behalf of the insured. But whether this is an absolutely accurate conclusion or not, it is certain that the defense relied upon is special in its nature and should have been specially pleaded.

On the trial, the Association contended that the policy had been cancelled on December 20, 1923 because of non-payment of premium, by a letter alleged to have been written to appellee by the appellant Association. Guyton claimed to have written it as attorney in fact and mailed it in the usual way. He produced what purported to be a copy of it. Appellee testified that he never received it, nor did he ever receive any notice of cancellation whatever. Guyton did not testify that he ever notified Wright of the cancellation, notwithstanding the policy had been sent to Wright, and payable to him as his interests might appear. It is not necessary for us to determine whether the letter was ever written or whether, if written, it was ever received by Bombassaro. The policy provides that the Association may cancel the contract at any time upon giving five days' prior notice and refunding one-third of the membership fee paid by the subscriber. No preliminary notice of cancellation was ever given appellee, nor was one-third of the fee returned to him. It is asserted that it was not necessary to return any portion of it because the Association had never received anything from appellee. This contention has no basis because the record discloses that appellee paid the fee to Wright, who was acting as appellant's agent in the matter of this insurance. Appellee's rights were not affected by the failure of the agent to forward the money to the Association. That was a matter between the Association, ~~that was~~ and its agent and not between the Association and the insured. We therefore conclude that the alleged attempt to cancel the policy was ineffective.

Appellee proved his case under the pleadings. The trial court committed no substantial error, if indeed any error at all. The court was fully warranted in assessing plaintiff's damages at \$350 and the judgment is affirmed.

Judgment Affirmed.

...in behalf of the insured. But whether this is an absolutely
...conclusion or not, it is certain that the defense relied upon
...in its nature and should have been specially pleaded.
On the trial, the Association contended that the policy had been
...on December 30, 1923 because of non-payment of premium, by a
...alleged to have been written to appellee by the appellant Associa-
...Guyton claimed to have written it as attorney in fact and mailed
...the usual way. He produced what purported to be a copy of it.
...testified that he never received it, nor did he ever receive any
...of cancellation whatever. Guyton did not testify that he ever
...Wright of the cancellation, notwithstanding the policy had been
...to Wright, and payable to him as his interests might appear. It is
...necessary for us to determine whether the letter was ever written or
...if written, it was ever received by Bompassaro. The policy
...evidences that the Association may cancel the contract at any time upon
...five days' prior notice and returning one-third of the membership
...paid by the subscriber. No preliminary notice of cancellation was
...given appellee, nor was one-third of the fee returned to him. It
...stated that it was not necessary to return any portion of it.
...the Association had never received anything from appellee. This
...has no basis because the record discloses that appellee paid
...to Wright, who was acting as appellant's agent in the matter of
...insurance. Appellee's rights were not affected by the failure of
...to forward the money to the Association. That was a matter
...between the Association and its agent and not between the
...Association and the insured. We therefore conclude that the alleged
...to cancel the policy was ineffective.
Appellee proved his case under the pleadings. The trial court
...admitted no substantial error, it indeed any error at all. The court
...fully warranted in assessing plaintiff's damages at \$250 and the
...and is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, ss. J. JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 17th day of
— April in the year of our Lord one thousand
nine hundred and twenty- six

Justus L. Johnson
Clerk of the Appellate Court.

Abstract only

13 276

AT A TERM OF THE APPELLATE COURT,

Began and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the Second
District of the State of Illinois:

241 I.A. 635

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 16 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

AT A TERM OF THE APPEAL COURT.

begun and held at Ottawa, on Tuesday, the ninth day of April, in the year of our Lord one thousand nine

Present--The Hon. AUGUSTUS A. PEARSON, Presiding Justice.

Hon. THOMAS H. TRITT, Justice.

Hon. NORMAN L. JONES, Justice.

JURATUS K. JOHNSON, Clerk.

R. J. WETTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
the 13th day of April, 1908, the opinion of the Court was filed in the
Court's office at Ottawa, in the case of
[illegible], [illegible].

General Motors Acceptance
Corporation,
Appellant,

vs.

Appeal from the Circuit
Court of Boone County.

A. J. Schaeffer, John Fair
Agent for
A. J. Schaeffer, and John
Fair, Sheriff of Boone County,
Illinois.

Appellees.

2411.A. 635

Jett, J.

This is a suit in replevin instituted by the General Motors Acceptance Corporation, appellant, against A. J. Schaeffer and John Fair, Sheriff of Boone County and agent for A. J. Schaeffer, appellees, in the Circuit Court of Boone County to recover the possession of three Oakland motor cars which A. J. Schaeffer, through John Fair as agent had taken under a chattel mortgage given to him, covering said goods and chattels, by one Claude B. Nichols.

The declaration consists of two counts. The first charges the wrongful taking of the property and the second, the wrongful withholding of the same. To the declaration the defendants filed five pleas. The first is non cepit; second, non detinet; third, special property in A. J. Schaeffer; fourth, property in John Fair, co-defendant, as agent for A. J. Schaeffer; fifth, the defendant John Fair as agent for A. J. Schaeffer claimed the property in the goods and chattels by virtue of a chattel mortgage given to said A. J. Schaeffer by C. B. Nichols and that possession had been taken of the property under the insecurity clause in the said chattel mortgage.

Issue was joined on the first, second, third and fourth pleas. To the fifth plea plaintiff filed a replication concluding with a verification by which replication plaintiff claims ownership of the property and setting forth as a basis for its claim of ownership and right to immediate possession thereof, that at the time the said C. B. Nichols gave the chattel mortgage to the said A. J. Schaeffer covering the goods and chattels involved in the replevin suit and for some time prior there-

General Motors Acceptance
Corporation,
Appellant,

Appeal from the Circuit
Court of Boone County.

vs. J. J. Scheffler, John Fair,
Agent for
J. J. Scheffler, and John
Scheffler, Sheriff of Boone County,
Appellees.

241 T. A. 682

This is a writ in replevin instituted by the General Motors

Acceptance Corporation, appellant, against J. J. Scheffler and John

Fair, Sheriff of Boone County and agent for J. J. Scheffler, appellees.

The Circuit Court of Boone County to recover the possession of

three Oakland motor cars which A. J. Scheffler, through John Fair as

agent had taken under a chattel mortgage given to him, covering said

cars and chattels, by one Claude B. Nichols.

The declaration consists of two counts. The first charges

the wrongful taking of the property and the second, the wrongful with-

holding of the same. To the declaration the defendants filed five

answers. The first is non cepit; second, non detinet; third, special

verdict for A. J. Scheffler; fourth, property in John Fair, co-defend-

ant, as agent for J. J. Scheffler; fifth, the defendant John Fair as

agent for A. J. Scheffler claimed the property in the goods and chattels

of the first of a chattel mortgage given to said J. J. Scheffler by

Nichols and that possession had been taken of the property under the

chattel mortgage.

Answer was joined on the first, second, third and fourth pleas.

by which replication plaintiff claims ownership of the property

and setting forth as a basis for its claim of ownership and right to

the chattel mortgage to the said A. J. Scheffler covering the goods

and chattels involved in the replevin suit and for some time prior there-

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to the plaintiff was the owner of the goods and chattels and was entitled to immediate possession thereof; that said C. B. Nichols had possession of said property for the purpose of storing the same and displaying it in his place of business at Belvidere, Illinois, and held the same in trust for the plaintiff; that the said C. B. Nichols signed a trust receipt covering and describing each motor car in detail in and by which trust receipt he acknowledged the ownership thereof in the plaintiff; that he, the said Nichols agreed to keep said motor vehicles brand new and not to operate them for demonstration or otherwise; that he would not sell, loan, deliver, pledge, mortgage or otherwise dispose of said motor vehicles to any person until after payment of amounts which were shown on original release orders which were held by the First National Bank of Belvidere. That the First National Bank of Belvidere, as agent for plaintiff held the trust receipts covering the said goods and chattels. That Nichols had possession of said property for the sole and only purpose of storing and displaying them and for no other, that this was the only privilege that he had to exercise over said property. That at any time during the four months period from February 12th, 1924, (date of chattel mortgage) in case Nichols still had possession of same for storing only and in case he met the payments stated in the original release orders held by the First National Bank as agent for plaintiff, specially describing each motor vehicle, the First National Bank, would have accepted the money, turned over the duplicate release order covering and describing the respective motor vehicles and turned over to said Nichols the trust receipt he had signed covering the respective motor vehicles, had he made these payments, the First National Bank would then have released to him the goods and chattels or any respective one of them; that the property was never released to him by the said First National Bank, but continued to be in the constructive possession or possessory control of plaintiff at all times, who had the legal title thereto. That the cars in question were originally in the ownership of Oakland Motor

and was the plaintiff was the owner of the goods and chattels and was entitled to immediate possession thereof; that said C. Nicholas had possession of said property for the purpose of storing the same and displaying it in his place of business at Belvidere, Illinois; that said the same in trust for the plaintiff; that the said C. Nicholas signed a trust receipt covering and describing each motor vehicle in and by which trust receipt he acknowledged the ownership thereof in the plaintiff; that he, the said Nicholas agreed to keep said motor vehicles brand new and not to operate them for demonstration purposes; that he would not sell, loan, deliver, pledge, mortgage, or otherwise dispose of said motor vehicles to any person until after payment of amounts which were shown on original release orders which were held by the First National Bank of Belvidere. That the First National Bank of Belvidere, as agent for plaintiff held the trust receipts covering the said goods and chattels. That Nicholas had possession of said property for the sole and only purpose of storing and displaying same and for no other; that this was the only privilege that he had to exercise over said property. That at any time during the four months from February 1st, 1934, (date of chattel mortgage) in case of default plaintiff had possession of same for storing only and in case he had not payments stated in the original release orders held by the First National Bank as agent for plaintiff, specially describing each motor vehicle, the First National Bank, would have accepted the money, turned over the duplicate release order covering and describing the respective motor vehicles and turned over to said Nicholas the trust receipt he had issued covering the respective motor vehicles, and he made these payments, the First National Bank would then have released to him the property and either or any respective one of them; that the property was never released to him by the said First National Bank, but continued to be in the constructive possession or possessory control of plaintiff at all times, who had the legal title thereto. That the motor vehicles were originally in the ownership of Oakland Motor

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Car Company and that said company did send the cars in question to the City of Belvidere under a bill of lading designated as "order bill of lading shipper's orders," and consigned to the Oakland Motor Car Company at Belvidere, Illinois, the Oakland Motor Car Company being the consignor and the consignee, which Order Bill of Lading provides that the Chicago and Northwestern Railway Company, being the carrier, was to notify C. B. Nichols when the cars arrived at Belvidere. That with said Bill of Lading was a certain sight draft sent by the Oakland Motor Company to the First National Bank of Belvidere, instructing said bank to act as agent for the Oakland Motor Car Company, and also the General Motors Acceptance Corporation, and to handle said goods for both of said companies with specific instructions to the bank in the handling of said cars. That among the papers sent to the bank was a bill of sale from the Oakland Motor Car Company, to the General Motors Acceptance Corporation, and on account of said Bill of Sale, the General Motors Acceptance Corporation became the owner of the said cars and on account thereof was entitled to immediate possession of said cars, which fact was known to the defendants, which is evidenced by the following recital in the chattel mortgage of appellees which is set out as follows: This mortgage is given expressly subject to all rights, liens and claims of the General Motors Acceptance Corporation who have first and prior rights and liens over the above cars and this mortgage is given subject to the rights and liens of said corporation." That on account of said provision in the mortgage the defendant Schaeffer dealt with Nichols, not as an innocent party but as a person who knew all of the conditions surrounding the title to the property in question, and that the cars referred to in the chattel mortgage were the same cars mentioned in the bill of sale from the Oakland Motor Car Company to the General Motors Acceptance Corporation.

The defendants filed a demurrer to the replication of the plaintiff to the fifth plea of the defendants. The demurrer was general and special. In the general demurrer the defendants state that the matters and things stated in the said replication are not sufficient in law for the plaintiff to maintain the aforesaid said replication and

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action and that the defendants are not bound by law to answer the same and this they are ready to verify. And for special causes for demurrer to the said replication of the plaintiff to the said fifth plea of the defendants, the defendants say that the said replication is double, and sets forth two or more alleged grounds of defense, and causes and reasons why the plaintiff is not barred from ~~maintaining~~ its action on account of any matters or things alleged, averred and set forth in defendant's said fifth plea, to-wit: (1) Because in the mortgage under which the defendants claim in said 5th plea the right to the possession and ownership of the property herein described, have recognized alleged superior rights or claims and liens and existing rights and liens of the plaintiff, and that therefore the defendant's are barred from having the possession and ownership of the said property as against the plaintiff; (2) because the plaintiff sets up, avers and alleges that it, the plaintiff, held and claimed the ownership and possession of the property described in its said replication under and by virtue of an alleged trust agreement and trust arrangement, and that the said goods, chattels and property mentioned in the said replication was the subject of bailment and the possession and ownership thereof was only constructively in C. B. Nichols and that the real possession and the real ownership of the goods and chattels alleged in said replication and in plaintiff's declaration was and existed in the plaintiff and not in the said C. B. Nichols nor in the defendants in manner and form as the defendants claim in their said fifth plea.

The replication to the fifth plea, to our minds, sets up a state of facts, which if true, shows ownership of the property in question to be in the plaintiff and the right to immediate possession thereof as contemplated by the Uniform Sales Act. The facts as set forth in said replication establish a conditional ~~sale~~ sales contract if they be true, and the demurrer admits them to be true. The fact that the replication recites and sets out a provision of the chattel mortgage does not necessarily make the replication double because after stating the conditions under which Nichols had the possession of the automobiles it states that Schaeffer had knowledge of the circumstances under which Nichols held them and that Schaeffer knew that he was taking the

and that the defendants are not bound by law to answer the same
they are ready to verify. And for special causes for demurrer
the said replication of the plaintiff to the said fifth plea of the
defendants say that the said replication is lawful, and
forth two or more alleged grounds of defense, and causes and reasons
the plaintiff is not barred from asserting its action on account
of matters or things alleged, averred and set forth in defendant's
fifth plea, to-wit: (1) Because in the mortgage under which the
defendants claim in said fifth plea the right to the possession and owner-
ship of the property herein described, have recognized alleged superior
title to plaintiff and thus has established title in the plaintiff
and that therefore the defendants are barred from having the
possession and ownership of the said property as against the plaintiff;
because the plaintiff sets up, avers and alleges that it, the
plaintiff, held and claimed the ownership and possession of the property
alleged in its said replication under and by virtue of an alleged
contract and trust arrangement, and that the said goods, chattels
and personal property are the same as those which were sold to the
plaintiff and the possession and control thereof was delivered to the
plaintiff and that the said goods and chattels are the same as those
which were sold to the plaintiff and in plaintiff's
possession and control in the plaintiff and that the said
goods and chattels are the same as those which were sold to the
plaintiff and in the plaintiff's possession and control in the plaintiff
and in their said fifth plea.
The replication to the fifth plea, as set forth, sets up a
case at issue, which is true, and is a proper and legal
case at issue and the plaintiff is entitled to recover thereon and
is entitled to the judgment of the court in its favor and in said
replication of the plaintiff's case. The facts as set forth in said
replication establish a conditional sales contract if they be true,
the demurrer admits them to be true. The fact that the replication
makes the replication double because after stating the condi-
tion of the plaintiff's case had the possession of the automobiles it
and knowledge of the circumstances under which

5.

chattel mortgage subject to the rights of the plaintiff. The replication therefore, pleads such facts as constitute a conditional sales contract with the further averment that the defendant Schaeffer had knowledge that Nichols had possession of the automobile in controversy subject to the rights and interests of the plaintiff.

In a long line of cases it has been held in Illinois that if a person sells to another a chattel on condition that the price shall be paid within a certain time, and the seller retains the title in the meantime, and the seller delivers the possession of the chattel to the buyer so as to clothe him with an apparent ownership, a bona fide purchaser, or execution creditor of the buyer, is entitled to protection and to a prior right to the property against the claim of the original owner. Heibrunn vs Ellsworth, 190 Ill. App. 388; Gilbert vs National Cash Register Co., 176 Ill. 288; Van Duzpr vs Allen, 90 Ill. 499; Michigan Central R. R. Co. vs Phillips, 60 Ill. 190; Murch vs Wright, 46 Ill. 487; Detcham vs Watson, 24 Ill. 501; Brundage vs. Camp, 21 Ill. 330.

It has also been held that secret liens of this kind are fraudulent and contrary to the policy of the Laws of Illinois, and should not be enforced. Rhodes vs Mo. Savings Co. 173 Ill. 621,

All of the cases above cited were decided before the Uniform Sales Act was adopted in Illinois. Prior to that time conditional sales were illegal in Illinois, and the courts refused to enforce such contracts even when made in a state where they were valid and binding. On July 1, 1915, the Uniform Sales Act went into effect. Its provisions were in conflict with some of the decisions in this state. One of the respects in which this statute changed the law was with reference to conditional sales contracts. Section 20 provides that "where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right

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of possession or property may be reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer." Cahills Ill. St. Ch. 121 a. p.23.

In Scherer - Gillette Co. vs. Long, 318 Ill. 432, the opinion was rendered after the instant case at bar was decided by the trial court, and it was there held that this section changed the rule in Illinois as to conditional sales contracts; that the statute recognized the validity of conditional sales with reservations of title in the seller; that when there is no basis for an estoppel against the seller, that no title can be conveyed by the buyer of goods under a conditional sales contract; even though the buyer has possession of the goods and the purchaser from the buyer had no notice of the reservation. To the same effect is the holding in Graver Bartlett Nash Co. vs. Peter Krons, and George Nelson, 239 Ill. App. 522.

Before the passage of this statute the refusal of the courts of this state to enforce foreign conditional sales contracts even under the doctrine of comity was based upon the grounds that such contracts were fraudulent under the law of this State, or contrary to our laws and should not be enforced to the prejudice of our citizens who might have demands against the vendee. The Uniform Sales Act entirely removed this reason.

There is nothing in this record to show or indicate that there is any basis for an estoppel against the seller. We conclude therefore, that the court erred in sustaining the demurrer to the replication to the defendants fifth plea. .

The judgment of the Circuit Court of Boone County is reversed and the cause remanded.

Reversed and Remanded.

possession or property may be recovered notwithstanding the delivery of goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer." Cahill v. St. Louis & S.W. Ry. Co., 238 Ill. 432, 93 Ill. App. 2d 238.

In Scherer v. Gillette Co., 78 Ill. 432, the opinion rendered after the instant case at bar was decided by the trial court, it was there held that this section changed the rule in Illinois as to conditional sales contracts; that the statute recognized the validity of conditional sales with reservation of title in the seller; and when there is no basis for an estoppel against the seller, that no title can be conveyed by the buyer of goods under a conditional sales contract; even though the buyer has possession of the goods and the seller has notice of the reservation. To the effect is the holding in Graver Bartlett Nash Co. v. Peter Kraus, 239 Ill. App. 523.

Before the passage of this statute the refusal of the courts of this state to enforce foreign conditional sales contracts even under the doctrine of comity was based upon the grounds that such contracts were fraudulent under the law of this state, or contrary to our laws, and would not be enforced to the prejudice of our citizens who might have claims against the vendee. The Uniform Sales Act entirely removed this reason.

There is nothing in this record to show or indicate that there is any basis for an estoppel against the seller. We conclude therefore, that the court erred in sustaining the demurrer to the replication to the defendant's fifth plea.

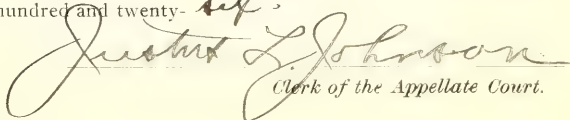
The judgment of the Circuit Court of Boone County is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 19th day of
april in the year of our Lord one thousand
nine hundred and twenty-six.


Clerk of the Appellate Court.

Abstract Only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of
April, in the year of our Lord one thousand nine
hundred and twenty-six, within and for the Second
District of the State of Illinois:

241 I.A. 635

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
APR 16 1926 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

The ninth day of
 April, in the year of our Lord one thousand nine
 hundred and twenty-six, within and for the Second
 District of the State of Illinois:

241 I.A. 635

Present—The Hon. AUGUSTUS J. PARKER, Presiding Justice.
 Hon. THOMAS M. TROT, Justice.
 Hon. NORMAN L. JONES, Justice.
 JUSTUS L. JOHNSON, Clerk.
 E. J. WELTER, Sheriff.

APRIL 1926
 The finding of the Court was that in the
 Clerk's office of said Court, in the words and figures
 following, to-wit:

Gust C. Bloom, August Johnson,
Albert Lindquist, and Ray Nelson,

Appellees,

vs.

Community Consolidated School
District No. 76 of Henry County,
Illinois and Willis Negston, August N.
Peterson, F. J. Johnson, Fred Samuel-
son, Frank Ericson, Franklin Johnson
and William Wimmerstedt, the Members
and Officers of the Board of Educa-
tion of Said School District, the
Community High School District No.
195 of Said County and A. E. Anderson,
Philip Brood, Titus Samuelson, Charles
N. Engnell, Luther Hultgren, the
Officers and Members of the Board of
Education of Said School District,
Delmore Brood, School Treasurer of the
Town of Andover, Henry County, Illinois.

Appellants.

Jett, J.

241 I.A. 635

Appeal from the Circuit
Court of Henry County.

Gust C. Bloom, August Johnson, Albert Lindquist, and Ray Nelson, appellees, filed their bill in the Circuit Court of Henry County against Community Consolidated School District No. 76 of Henry County, Illinois and Willis Negston, August N. Peterson, F. J. Johnson, Fred Samuelson, Frank Ericson, Franklin Johnson and William Wimmerstedt, the Members and Officers of the Board of Education of said School District, The Community High School District No. 195 of Said County and A. E. Anderson, Philip Brood, Titus Samuelson, Charles N. Engnell, Luther Hultgren, The Officers and Members of the Board of Education of Said School District, Delmore Brodd, School Treasurer of the Town of Andover, Henry County, Illinois, appellants, to enjoin the defendants, (appellants here) from erecting a school building upon a certain site, selected and determined upon by the Board of Education.

The ground for the injunction, is that there was no affirmative vote of the voters of the said school districts, selecting the proposed site on which to erect the building. A trial was had and the chancellor found for the appellees, and against the appellants, and enjoined them as prayed for in the bill of complaint, and entered a decree accordingly, from which decree appellants have prosecuted this appeal. Appellees

et al. Bloom, August Johnson,
Albert Lindquist, and Ray Nelson,

Appellees,

vs.

241 A. 635

Appeal from the Circuit
Court of Henry County.

Community Consolidated School
District No. 76 of Henry County,
Illinois and Willis Negaton, August M.
Peterson, E. J. Johnson, Fred Samuel-
son, Frank Ericson, Franklin Johnson
as William Wimmerstedt, the members
of the Board of Education of
Said School District, the
Community High School District No.
1 of Said County and A. E. Anderson,
Philip Brood, Titus Samuelson, Charles
H. Haggell, Luther Hultgren, the
Officers and Members of the Board of
Education of Said School District,
Delmore Brood, School Treasurer of the
Town of Andover, Henry County, Illinois.

Appellants.

Great G. Bloom, August Johnson, Albert Lindquist, and Ray

Nelson, appellees, filed their bill in the Circuit Court of Henry

County against Community Consolidated School District No. 76 of Henry

County, Illinois and Willis Negaton, August M. Peterson, E. J. John-

son, Fred Samuelson, Frank Ericson, Franklin Johnson and William Wim-

merstedt, the Members and Officers of the Board of Education of said

School District, The Community High School District No. 1 of said

County and A. E. Anderson, Philip Brood, Titus Samuelson, Charles H.

Haggell, Luther Hultgren, The Officers and Members of the Board of

Education of Said School District, Delmore Brood, School Treasurer of

the Town of Andover, Henry County, Illinois, appellees, to enjoin the

appellees (appellees here) from erecting a school building upon a

certain site, selected and determined upon by the Board of Education.

The ground for the injunction, is that there was no affirmative

action of the voters of the said school districts, selecting the proposed

site on which to erect the building. A trial was had and the chancellor

granted the injunction, and against the appellees, and enjoined them

from erecting a school building upon the site, and entered a decree accordingly.

On appeal the appellees have presented this appeal. Appellees

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are voters and tax payers of the two school districts. That there had been no affirmative vote, selecting the proposed site on which the building was to be constructed, is conceded by appellants, but they contend that the various provisions of the School law relied upon by appellees, have no application to the situation here, because the statute applies only to the selection of sites, which are to be purchased, and that the site herein in question, is a dedicated one, and for that reason, and under the statute, the Board of Education has the right to accept gifts and donations of school house sites.

There is no serious dispute about the facts in this proceeding. So far as the merits of this controversy are concerned, the question presented on this appeal is as follows:- Since the amendment of 1923, can a Board of Education lawfully locate a school house site, or build a school house thereon, without having first obtained the authority of the electors of the district? And in connection with this main question can a Board of Education take the initiative in selecting a site and call an election for that purpose, without being petitioned therefor, by not fewer than three hundred legal voters of such district, or by one-fifth of all the legal voters of such district? And in the event no school site receives a majority of the votes cast at such election, is it the duty of the Board of Directors to call a supplementary election at which the sites receiving the highest and next highest number of votes at the first election shall be voted upon, and that then the site receiving the majority of the votes cast, on such proposition shall be the school house site for such district?

Under the school law as it existed for a number of years prior to 1923, a Board of Education which had the same powers as a Board of School Directors, had statutory authority to select a suitable school house site, provided, that on the submission of the selection of a school house site, to the voters of the school district, they failed to select a suitable site by a majority vote. This law was changed by the legislature in 1923, when it passed an Act, entitled "An Act to amend Sections 40 and 127 of "An Act to Establish and maintain a system

voters and tax payers of the two school districts. That there had

no affirmative vote, selecting the proposed site on which the

building was to be constructed, is conceded by appellants, but they

claim that the various provisions of the School Law relied upon by

appellees, have no application to the situation here, because the

law applies only to the selection of sites, which are to be purchased,

and that the site herein in question, is a dedicated one, and for that

reason, not subject to the provisions of the School Law. The court of appeals

has affirmed the judgment of the district court.

There is no doubt that the School Law is a general law, and that

it applies to all school districts, and that it is not limited to

cases on this appeal is as follows: - Since the amendment of 1922,

a Board of Education lawfully locate a school house site, or build

a school house thereon, without calling an election, and without the

election of the district? And in connection with this main question

a Board of Education take the initiative in selecting a site and call

an election for that purpose, without being petitioned therefor, by not

less than three hundred legal voters of such district, or by one-fifth

of the legal voters of such district? And in the event no school

house receives a majority of the votes cast at such election, is it the

duty of the Board of Directors to call a supplementary election at which

the site receiving the highest and next highest number of votes at the

first election shall be voted upon, and that then the site receiving the

majority of the votes shall be the site of the school house?

Under the school law as it existed for a number of years prior

to the amendment of 1922, the Board of Education was not authorized

to select a site, but was required to call an election for the selection of a

site, provided, that on the submission of the selection of a

site, to the voters of the school district, they failed

to select a site, the law was changed by the amendment of 1922, entitled "An Act to

of free schools," approved June 12, 1909, as amended. Illinois Session Laws of 1922, page 606.

Section 127 of the School Law so far as it is applicable to the question under consideration, as amended is as follows:

"The Board of education shall have all the powers of school directors, but subject to the same limitations, and in addition thereto, they shall have the power, and it shall be their duty * * *: Fifth: To buy or lease one or more sites for school houses with necessary ground, and to purchase, build or move a school house, but it shall not be lawful for such school board of education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all votes cast on this proposition at an election called for such purpose in pursuance of a petition signed either by not fewer than three hundred legal voters of such district or by one-fifth of all the legal voters of such district. If no site shall receive a majority of all the votes cast at such election on this proposition, the board of education shall call a supplementary election at which the sites receiving the highest and next highest number of votes at the first election shall be voted upon, and the site receiving the majority of the votes cast on such propositions at either election shall be the school site for such district; and the board of education shall have the right to take and purchase the same for the purpose of a school house site, either with or without the owner's consent, by condemnation or otherwise. Provided that no site shall be placed upon the ballot unless petitioned for by at least ten legal voters of the district; said petition shall recite the location, size and price, or in case condemnation proceedings are contemplated, the maximum estimated price of the proposed site and shall be filed with the clerk of the Board of education at least ten days prior to the election. An abstract of the information recited in said petition in reference to the location, size and price of the proposed site shall be plainly printed on the ballot, and in no case shall the board of education purchase any such property for a greater sum than the price or maximum estimated price stated upon the ballot."

From said Section 127, it will be observed that "it shall not be lawful for such school board of education to purchase or locate a school house site, or to purchase, build, or move a school house, unless authorized by a majority of all votes cast on this proposition at an election called for such purpose, in pursuance of a petition signed either by not fewer than three hundred legal voters of such district, or by one-fifth of all the legal voters of such district." The statute provides only one way for the selection of a school house site, and that way is provided by Section 127 of the School law above quoted.

In Bierbaum vs. Smith, 317 Ill. 147, the trustees of schools

Section 187 of the School Law so far as it is applicable to

question under consideration, as amended is as follows:

"The Board of education shall have all the powers of school directors, but subject to the same limitations and in addition thereto, they shall have the power, and it shall be their duty, with: To buy or lease one or more sites for school houses with necessary grounds, and to purchase, build or move a school house, but it shall not be lawful for such school board of education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all votes cast on this proposition at an election called for such purpose in pursuance of a petition signed either by not fewer than three hundred legal voters of such district or by one-fifth of all the legal voters of such district. If no site shall receive a majority of all the votes cast at such election on this proposition, the board of education shall call a supplementary election at which the sites receiving the highest and next highest number of votes at the first election shall be voted upon, and the site receiving the majority of the votes cast on each two positions at either election shall be the school site for such district; and the board of education shall have the right to take and purchase the same for the purpose of a school house site, either with or without the owner's consent, by condemnation or otherwise. Provided that no site shall be placed upon the ballot unless petitioned for by at least one legal voter of the district; said petition shall recite the location, size and price, or in case condemnation proceedings are contemplated, the maximum estimated price of the proposed site and shall be filed with the clerk of the Board of education at least ten days prior to the election. An abstract of the information recited in said petition in reference to the location, size and price of the proposed site shall be fairly printed on the ballot, and in no case shall the board of education purchase any such property for a greater sum than the price or maximum estimated price stated upon the ballot.

From said Section 187, it will be observed that "it shall

be lawful for such school board of education to purchase or locate

a school house site, or to purchase, build, or move a school house,

authorized by a majority of all votes cast on this proposition

at an election called for such purpose, in pursuance of a petition

signed by not fewer than three hundred legal voters of such

district, or by one-fifth of all the legal voters of such

district, provides only one way for the selection of a school house

site, and that way is provided by Section 187 of the School Law above

4.

in a township, in Madison county, filed a petition for the condemnation of certain real estate for a site on which to construct a new school building, for a community consolidated school district. The petition was based on the holding of a special election in May, 1923, in that district, for the purpose of voting upon the proposition of locating a school house site and authorizing the board to purchase the same, and the subsequent action of the board of education in selecting the site in question, no site having received a majority of all the votes cast at the election." The county court dismissed the petition and an appeal was prosecuted to the Supreme Court, and at page 149 the court said:-

"A valid election, to select a school house site, is a condition precedent to the maintenance of condemnation proceedings to procure such site. Appellants having failed in this case, to show by competent evidence that a valid election for that purpose had been held, the court properly dismissed the petition."

The facts in that case are not unlike the facts in the case at bar. There, as here, an election was held for the purpose of voting upon the question, among others, of locating a school house site, and no site having received a majority of all the votes cast at the election, the board of education attempted to select the site, and the court in effect held that the statute means just what it says, that in order to legally select a school house site, the statutory method must be pursued. Since the amendment of 1923, the board of education has no power, whatever, to select a site, but if the electors fail in the first election to select one, then it is the duty of the board of education to call a supplementary election, which if pursued, is bound to result in the selection of a site. The power to select a school site is lodged with the electors of the district. The legislature has expressed a well defined purpose to give the residents of every school district the right to select the school house site. The wisdom of the legislature in this behalf is obvious and it is the duty of the court to give full expression of their approval thereto, as a matter of sound policy. We do not think the contention of appellants is tenable.

In the argument of this case on the part of appellees, it was insisted that there was no file mark showing that the certificate of

... township, in Madison county, filed a petition for the condemnation
... certain real estate for a site on which to construct a new school
... for a community consolidated school district. The petition
... based on the holding of a special election in May, 1923, in that
... for the purpose of voting upon the proposition of locating
... horse site and authorizing the board to purchase the same, and
... of the board of education in selecting the site
... no site having received a majority of all the votes cast
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"A valid election, to select a school house site,
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... of education attempted to select the site, and the court in effect
... that the statute means just what it says, that in order to legally
... school house site, the statutory method must be pursued. Since
... of 1923, the board of education has no power, whatever, to
... site, but if the electors fail in the first election to select
... it is the duty of the board of education to call a supplement-
... tion, which if pursued, is bound to result in the selection of
... the power to select a school site is lodged with the electors
... district. The legislature has expressed a well defined purpose
... the residents of every school district the right
... the school house site. The wisdom of the legislature in this
... is obvious and it is the duty of the court to give full expression
... approval thereto, as a matter of sound policy. We do not think
... of appellants is tenable.

5.

evidence was filed in the office of the clerk of the Circuit Court. Appellants suggested a diminution of the record. A certificate from the clerk of the Circuit Court of Henry county in answer to the suggestion to the diminution of the record, shows that the certificate of evidence was filed July 7th, 1925, which was in due time.

We conclude, therefore, that the decree of the Circuit Court of Henry county should be affirmed, which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS. / ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. 19th day of
— april — in the year of our Lord one thousand
nine hundred and twenty-^{sup.}—

Justus L. Johnson
Clerk of the Appellate Court.

General No. 7838

Agenda 1

Edward Gross, Defendant in Error.

vs.

241 I.A. 635

William W. Wheelock and William G. Bierd, Receivers,
Chicago & Alton Railroad Co., Plaintiffs in Error.

Error to Circuit Court of Pike County

NIEHAUS, P. J.

This action was brought in the circuit court of Pike county by Edward Gross, defendant in error, to recover damages for injuries sustained while attempting to board a moving freight train of the Chicago & Alton Railroad at Granite City, to "steal" a ride to Alton. It is clear that the defendant in error, in making the attempt to board the train was a trespasser; but the declaration alleges, that while the defendant in error was making the attempted to board the train, one of the servants of the plaintiffs in error, operating the road as Receivers, negligently ordered the defendant in error to get off the train; and unlawfully, wantonly and wilfully struck the defendant in error, and shoved and kicked him off of the freight car, which he was trying to board; and thereby caused him to fall under the moving train, whereby he was injured. A trial of the case resulted in a verdict and judgment for the defendant in error, fixing his damages at \$13,555.00. This appeal is prosecuted from the judgment.

A number of assignments of error are pointed out in the arguments of counsel for plaintiffs in error; but for the purposes of this opinion, it will be necessary only to consider the main ground urged for reversal of the judgment, namely, that the verdict of the jury is manifestly against the weight of the evidence.

The defendant in error rested his case on the testimony of one witness, Peter Dailey, who was his companion in the attempted freight train ride from Granite City to Alton. This

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witness testified, that he and the defendant in error had decided to catch the train; that it was arranged, that the defendant in error should catch it first; that the train came along going north, and traveling at the rate of about 15 miles per hour; there were about 40 cars in the

train, with a caboose on the rear end; that the defendant in error attempted to get on the third car from the caboose—a box car; and that he got on the front end of the car, on an iron ladder; that there was a coal car immediately in front of the box car; that the sides of the coal car were about half as high as the box car; and that as the train came along, the defendant in error ran with it, grabbed hold of the ladder, and jumped into the stirrup; that after the defendant in error got up on the ladder, the witness saw a man (whom he afterwards testified was the conductor,) standing between the box car and the coal car; and that this man made an attempt to get over to the defendant in error, and that as he did, the witness ran with the train to see what the man was going to do with the defendant in error; that the man said something to the defendant in error, but the witness did not know what he said; that he ran with the train up on the top of a little bank just to the east of the ties, that there was a level foot path there; that the man was on the top of the coal car, and stepped off of it; and that the witness said to the man—"hey, what in the H—are you trying to do?" and the man came down with his foot on the defendant in error's hand, and hit him in the face with his fist; and that the defendant in error fell; that he hit the bank, and as he did, he flew or rolled against an oil box; and the oil box struck him in the back. That when the defendant in error was kicked, witness made a grab for him, but did not get hold of him, but missed him; that witness kept on running, making grabs at the defendant in error—then the oil box got him in the back; and as it did, some way his foot got under the wheels.

Dailey's testimony to the effect that the defendant in error was injured by being kicked off or knocked off of the train

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by Howard Hensley, the conductor on the train, was at variance with the testimony of at least six persons, who observed the occurrence, and who were called as witnesses for the plaintiffs in error. **G. T. Kemp**, one of the brakeman on the train in question, testified, that he was standing on the steps of the caboose, as the train approached 19th street in Granite City, the scene of the accident; that he was standing on the steps of the caboose to receive orders from the station agent as the

train passed the station; and was looking ahead, and saw what took place; 'that, as the train approached 19th street, he saw two men standing' there; that they might have been coming from the other side of the track—that they kind of walked that way, about middle ways of the train; and when they got up close enough to the train, the middle of the train had moved on, and a fellow started to catch the train. The best he could tell, about where the man first attempted to get on the train, was at a point eight or nine cars ahead of the caboose.' The man did not succeed in getting on at the first attempt, but let that car go by, and made another attempt. It looked as if the second attempt was the next car that came along. He got hold of the grab iron of the car, and 'it seemed like the train was going faster than it had; and it dragged him down or something; the car ketched him in the back, and he hit on the ground.' The speed of the train was then about 18 miles an hour. **Theodore T. Ayresman**, another brakeman on the train in question, testified, that he was in the cupola of the caboose, keeping a lookout; and from this position could see, and did see, what happened. His testimony is as follows: "As we approached the first street south of the depot, I saw one fellow,—he ran along the side of the train—I believe there were two—one of them was standing over to the side, and it didn't seem like he was running after the train. I watched this fellow,—he tried to get hold once or twice, and it seemed like about the second or third time he got hold with his left hand, and it swung him around, and the car or something

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hit him and pushed him forward—it looked like he went completely under the train; I hollered to the conductor to pull the air, we have run over a man." **George Schwartz**, a contractor, residing in Granite City, testified, that he saw the accident, that he was sitting in an automobile with Mr. Cassidy, about 25 feet east of where the accident occurred. His testimony is as follows: "My attention was attracted to the two men standing on the sidewalk, and one of them tried to get on the freight train. He tried several times, and he was thrown back, one time he fell down on his hands and knees, and was almost thrown under; and he attempted to get hold of the second car that came, and he was dragged under the freight train. He would

get held of it, and in trying he would be thrown around, he would talk and laugh with the other fellow that was standing on the sidewalk. It was a box car he was attempting to get on when he finally went under the wheels." **J. W. Cassidy**, publisher of the Granite City Post, testified as follows: "At the time of the accident to the boy at 19th street, I was sitting in my automobile with Mr. Schwartz, about 25 or 30 feet east of the train, facing the train. When we stopped, there were two young men standing along next to the train as it was going by—what attracted my attention, the smaller of the two was attempting to get on the train; I would judge he made about four or five attempts to get the train. He would run along the side of the car, one time he grabbed the handle of the bars and partially grabbed them; and fell down on his hands and knees; other attempts looked to me as if he didn't touch the handle bars—the last time he grabbed, the speed of the train switched him under the box car." **G. W. Cowherd**, who was the crossing switchman at 19th street in Granite City, testified as follows: "I remember the accident that occurred on 19th street, when a young man got his leg badly injured. *** There was a couple of young men, that appeared to me came across from the east side like they were going on the west side. They came by me, and walked over to the train which I had flagged. They

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stopped in the street and stood there a little bit—directly one stood out in the street and grabbed the iron—the strap you take hold of—and it threw him down on his knees in the street. Then he got up and ran after the train. I counted thirteen steps, which would make it about 39 feet, and he grabbed it again, and it threw him under the wheel." **George Thompson**, a crossing switchman of the Terminal Railroad Company, testified as follows: "I saw the accident which occurred on 19th street in Granite City on Sept. 4, 1923. I was going west on 19th street. I stopped right across from the watchman's shanty. *** I was acquainted with the watchman, who was flagging the train. I waited to talk to him. While I was waiting I saw a man go out a little past the middle of 19th street, and he ran with the train, but failed to get hold, so he went back to the south side of the crossing, and ran again with the train. I think he made three runs—I know he

made two runs--and the last run he made, he grabbed for the train and it threw him to the ground and he did not get up again."

And the testimony of these witnesses about how the defendant in error received his injuries, is in harmony with the defendant in error's own statement about the matter, which appears in the testimony of Dr. J. J. Fitzgerald, a physician residing in Granite City, who was called upon to give him first aid, after the defendant in error had suffered the injuries in question. The doctor testified that the defendant in error's statement to him about how he was injured, was as follows: "He told me that he was hopping this train and fell under the wheels--fell under the train." It may also be pointed out, the evidence in the record conclusively shows, that conductor Hensley, whom Dailey testified, was the man that struck and kicked the defendant in error, while attempting to board the train, was, at the time of the accident, sitting at his desk in the caboose making out reports; and that Ayresman, the brakeman, when the defendant in error fell under the train, called on him to stop the train;

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Hensley at once stepped out on the rear platform of the caboose in which he had been sitting, released the air valve and stopped the train.

In this condition of the proof, it is apparent, that the verdict of the jury was manifestly against the weight of the evidence; the judgment on the verdict is therefore erroneous. *Belden v. Innis* 84 Ill. 78; *Donelson v. E. St. L. & S. R. Co.* 235 Ill. 625.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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General No. 7895.

Agenda 4

241 I.A. 686

The People of the State of Illinois, Defendants in Error.

vs.

Oliver Lindsey, Plaintiff in Error.

Error to County Court, Morgan County.

NIEHAUS, P. J.

In this case the state's attorney of Morgan county filed an Information in the County court containing six counts, against the plaintiff in error, Oliver Lindsey, charging him with unlawfully manufacturing intoxicating liquor, and with unlawfully owning, and having an interest in a certain still; and with unlawfully maintaining a certain still. The plaintiff in error made a motion to quash the Information, and each count thereof; and the state's attorney made a cross motion for leave to amend the Information. The cross motion of the state's attorney was allowed by the court; and thereupon the state's attorney filed an amended Information. A motion was then made by the plaintiff in error to quash the amended Information, and each count thereof, which motion was denied; whereupon plaintiff in error pleaded not guilty. A trial followed upon the amended Information; and the jury returned a verdict finding the plaintiff in error guilty in manner and form as charged in the 4th and 6th counts of the amended Information; and the plaintiff in error was thereupon sentenced to six months imprisonment on the Illinois State Farm. This writ of error is prosecuted from the judgment of conviction.

It is insisted by the plaintiff in error, that the trial court was in error, in allowing the state's attorney to file an amended Information under the leave given to amend the original Information. It may be said with reference to this contention, that the record discloses the fact, that the leave given the state's attorney was general in its terms, and sufficiently broad to include the amendments contained in the amended Information; there was therefore no legal impropriety in the

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making of the amendments in the form of an amended Information.

It is also urged, that the verdict of the jury was contrary to the evidence; and that there was not sufficient evidence adduced to show plaintiff in error's guilt of the

charges contained in the 4th and 6th counts of the Information, beyond reasonable doubt. We are of opinion, that the jury were fully warranted in reaching the conclusion, from the evidence, that the plaintiff in error was the owner of the still referred to in the Information; and that he maintained the still at the residence of the witness, George Willerton, in Morgan county, for the purpose of the manufacture of intoxicating liquor.

We find no substantial error in the giving of the 1st and 9th instructions complained of, nor in the refusal of the court to give instruction No. 33 for the plaintiff in error. It was proper to instruct the jury that the Information was of itself a mere accusation or charge against the defendant, and not of itself any evidence of his guilt, as stated in the refusal instruction; but the plaintiff in error added another proposition, namely, that no juror should permit himself to be to any extent influenced against the plaintiff in error on account of the Information. The latter statement was misleading in this respect, that the jury could have inferred, that the Information was not to be considered by them for any purpose. While the Information shouldn't be considered as evidence, the jury should consider the Information in connection with the evidence, as an accusation and charge. It may also be said in this connection, that the instructions given for the plaintiff in error fully and strongly emphasized, that the plaintiff in error could be convicted only by evidence; and that this evidence must show his guilt beyond a reasonable doubt; and that he was presumed to be innocent until evidence of the character and conclusiveness referred to, was adduced against him.

We find no reversible error in the record, and the judgment of conviction is therefore affirmed.

Affirmed.

General No. 7905.

Agenda 13.

George Darrah, Appellee.

vs.

Jesse W. Wade, Appellant.

Appeal from Pike

241 I.A. 636

NIEHAUS, P. J.

This suit was brought by the appellee, George Darrah against the appellant, Jesse W. Wade, to recover the value of a certain amount of corn which the appellee claimed he purchased and was the owner of, and which was converted by the appellant to his own use. There was a trial by jury in the circuit court of Pike county, and a verdict and judgment in favor of the appellee for \$114.69. This appeal is prosecuted from the Judgment.

The only questions raised on appeal by the assignments of error is, that the court erred in overruling the appellant's motion for a new trial, and the rendition of the judgment for the appellees; no specific reasons are presented or argued in the briefs to sustain the errors assigned. The matters argued by appellant concern controverted questions of fact, namely, whether the appellee purchased the corn in question, and whether he was the owner of the corn at the time the appellant took possession of it, and converted it to his own use. The jury which heard and saw the witnesses that testified about this matter, found in favor of the appellee on these issues of fact; and the finding of the jury was sustained by the trial court. In this state of the record, this Court would not be warranted in holding that the trial court should have granted a new trial; and the overruling of the motion for new trial cannot be considered as error. The judgment is therefore affirmed.

Affirmed.

General No. 7914.

Agenda 22.

A. Vonruden, Appellee.

vs.

Wabash Railway Company, Appellant.

Appeal from County Court, Christian County.

NIEHAUS, P. J.

241 I.A. 836

In this case the appellee, A. Vonruden, sued the appellant, Wabash Railway Company, before a Justice of the Peace in Christian county, to recover damages for injuries to two mules, which with a consignment of mules had been transported by two railroads from Morrisonville, Illinois, to Memphis, Tennessee. There was a trial of the case in the county court on appeal from the judgment rendered by the Justice of the Peace, which resulted in a verdict and finding in favor of the appellee, assessing his damages at \$180.00. Judgment was rendered against the appellant on the verdict of the jury; and this appeal is prosecuted from the judgment.

The appellant urges for reversal of the judgment that 'there was absolutely no evidence of any misconduct or neglect on the part of the appellant railway company; and that there were only two animals injured; and that the nature of the injuries to these were such that very likely could have been caused from kicking and fighting, due to the restlessness among the animals themselves. The record discloses, that the injuries to the mules in question occurred during their transportation from Morrisonville to Memphis; that the consignment of mules were received at Morrisonville by the appellant railroad, and carried to East St. Louis, and at that point transferred to the Illinois Central Railroad, which carried them to destination; that when received by the appellant railroad the mules were all sound and uninjured; but when the consignment arrived at destination the two mules in question were found to be in an injured condition.

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Fred Secrest, who was present when the mules were unloaded, testified, that he saw them unloaded; and at that time one of the mules 'had a bruised knee, which was pretty bad;' also, 'that it's leg was swollen in front; and that the other mule had its hock injured.' The in-

juries to the mules were more particularly described by the appellee, who saw them shortly after they had been unloaded. He testified with reference to the injuries, that "one brown horse mule had a front knee all bunged up and swollen; and had a knee about as big as my head." **** "Another one had its hock cap injured, and his leg was swollen about three times as large as it should have been." No evidence was offered, and none appears in the record, tending to show that the animals were vicious; or that they had propensities such as would likely cause them to kick or fight among themselves, nor which would likely have resulted in the injuries described. It may be said concerning the contention of appellant that there was no evidence of any misconduct or neglect on the part of the appellant railroad, that it is not necessary that the proof of misconduct or neglect should be by direct or positive evidence; and that the inference can reasonably be drawn from the evidence in the record; from the nature and character of the injuries, and the manner and incidents of the transportation on the two railroads involved, that there probably was improper handling of the animals in the cars in which they were confined, or, in the transfer from one railroad to the other; and the evidence apparantly presents a prima facie case for recovery on this point. And no evidence whatever was adduced by the appellant's company to rebut the prima facie case made by the proofs for appellee.

Appellant also contends that there was error in the instructions in that the court did not apply Federal rules of liability under the provisions of the Carmack Amendment, as a basis for recovery; and that because of this error the court shifted the burden of proof from the appellee to the appellant. We think there was error in the instructions in that respect; but in the state of

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the proofs as disclosed by the record, appellant was not harmed thereby; and that the error did not have the effect of shifting the burden of proof from the appellee to the appellant. All the proof made tending to show what probably caused the injuries to the mules, was made by the appellee; and the appellant adduced no proof whatever on this issue. There was therefore no question in the case as to which party had to carry the burden of proof. The only question involved concerning the evi-

dence on this point is whether it is sufficient to justify the inference therefrom, of negligence on the part of the appellant railroad, or the other railroad carrier which handled the mules in the transportation; and concerning this question, we are of opinion, that the inference of negligence is warranted. Under these circumstances, we do not regard the error in the instructions referred to, as reversible error; especially since by the instruction the court submitted to the jury for determination the contention of fact insisted upon by the appellant in defense, that the injuries to the mules resulted from the natures, habits, propensities, viciousness, or other inherent acts of the animals themselves.

For the reasons stated, the judgment is affirmed.
Affirmed.

General No. 7950

Agenda No. 49

George Underhill, Appellee

vs.

Illinois Central Railroad Company, a Corporation,

Appellant.

Appeal from Logan.

NIEHAUS, P. J.

In this case the appellee, George Underhill, sued the appellant, Illinois Central Railroad Company, in the Circuit Court of Logan county, to recover damages resulting from the destruction of a slaughter house and contents by fire, which he alleged originated from the sparks of a passing freight train operated by the appellant. There was a trial, which resulted in a verdict and judgment against the appellant, in the sum of \$1,000.00. This appeal is prosecuted from the judgment.

The principal ground urged for reversal of the judgment is that the verdict of the jury was manifestly against the weight of the evidence. It is contended by the appellant, that "with slight contradiction, the evidence shows, that the train in question drifted through Mt. Pulaski, and passed the slaughter house with throttle closed and not working steam, and that under such circumstances, it was a physical impossibility for it to be emitting any sparks." It is also contended, that "there is no contradiction in the evidence as to the fact that the engine was equipped with the best and most approved appliances for the arresting of sparks; that it had been inspected just prior to starting out on this trip; and such appliances were found in perfect condition, and likewise, that it was inspected at the conclusion of the trip; and its spark arresting appliances were still in good order." Concerning the matter of the emission of sparks from the engine of the train that passed the slaughter house in question, which was situated adjacent to and in close proximity to the railway tracks upon which the

Page 1.

passing train and engine was moving, *Fred Starr*, a witness for the appellee, testified, that he lived on a farm west of Mt. Pulaski; and that he saw the slaughter house

burn; that the house where he lived was about three quarters of a mile west of the slaughter house; that there was a corn field between his house and the scene of fire; and there was nothing to obstruct his view; that he got up about 4:15 in the morning, and noticed a train switching when he arose; and that he could hear loud puffing, and could see the train; that when he heard the train puffing, he saw the fire; that fire flew from the engine. His description of the incident is as follows: "Can't describe the appearance of the sparks, I just can't tell. From the way it looked they were going up about 20 feet I suppose. Saw them about two or three minutes I suppose. Can't tell how long the train was there. Sounded to me like it was switching. Looked like it was plenty of sparks when it was puffing. It was dark at the time, didn't get light before 6:30. Judge train was there about ten minutes. Didn't watch it quite that long. I went further away, but still heard it. It afterwards left going north or northwesterly rather like. Could tell which way it was moving by the blaze of fire blowing back. I got up and heard a train switching, the fire was flying. It went on and I went back to the barn. In the meantime another one came by there and they were also throwing fire. The fire I saw was at the Underhill slaughter house. When the second train came in, the slaughter house was all ablaze. That is what attracted my attention, I saw the train there throwing sparks, and I saw the slaughter house afire. The first train had left about 15 minutes before or something like that. When I saw the slaughter house afire, I don't know how far the first train had gone, paid no attention to it." The testimony of this witness is substantially corroborated by his son, Cordy Starr, and his wife, Mildred Starr, who also testify that they saw the sparks of fire flying from the engine of the passing train in question. It is true, that the testimony of these witnesses was controverted and contradicted by a number of witnesses called for the appellant; but whether the witnesses for the

appellee or the witnesses for the appellant, told the truth concerning this controverted matter, was a question peculiarly within the province of the jury, who heard and saw the witnesses that testified, has been repeatedly held. It is clear, that under these circumstances this court in reviewing the evidence, would not be justified in holding, that the jury should have believed the witnesses for the appellant, instead of those for the appellee. As stated by the appellant, the evidence tends to show, that the engine in question was equipped with the best and most approved appliances for arresting sparks; and that it had been inspected just prior to starting out on the trip; also, at the conclusion of the trip; and that its spark arresting appliances were apparently in good order, both before and after the trip. But this evidence did not necessarily rebut the prima facie case made by the testimony of appellee's witnesses; and the weight of this evidence was also a matter for the jury to consider and determine in connection with the testimony of the witnesses for appellee. *Atwood v. C. M. & St. P. R'y. Co.*, 313 Ill. 59. This court therefore, would not be warranted in holding, that the verdict of the jury was against the weight of the evidence. Appellant complains of some of the rulings of the trial court in the admission and exclusion of evidence; but the record does not disclose any reversible error in that regard. We are also of the opinion, that there is sufficient competent evidence in the record to show that the appellee suffered damages to the full amount of the sum which was fixed by the verdict of the jury.

For the reasons stated, the judgment is affirmed.

Affirmed.

The People of the State of
Illinois,

Defendant in Error

vs.

Tony Brush,

Plaintiff in Error

Error to the County Court
of Christian County.

241 I.A. 536

Crow, J.

Plaintiff in error was engaged in the sale and possession of intoxicating liquor in violation of the Prohibition Act. By a decree of the County Court he was enjoined from selling, keeping, or storing intoxicating liquor at a certain place described in the decree, or anywhere else in Christian County or the State of Illinois. Afterward the state's attorney filed an information in the County Court stating and charging facts constituting a violation of the terms of the injunction. The information, however, charged that the acts constituting the violation were done in another place and in a building other than that described in the injunction decree.

Process having been served upon him he filed an answer to the information and the cause was heard before the County Court upon the charge. The court found him guilty and sentenced him to confinement in the county jail for a period of 150 days and to pay a fine of \$500 and costs. To reverse the judgment this writ of error is prosecuted.

Several errors were assigned. We deem it necessary to notice but one. Counsel for plaintiff in error contends that the injunction restraining him from operating at a place described in the decree is not operative against him in this case because the offense alleged to constitute a violation of it was committed in another place. Counsel for defendant in error contends that the injunction was operative against him throughout the county and the state. The contention of defendants in error cannot be sustained. The Supreme Court in *People v. Brush*,

218 Ill. 307, recently decided apparently in the same injunction matter, held that in so far as the decree restrained Brush from selling or keeping intoxicating liquor upon any other premises in Christian County or in the State of Illinois in violation of the provisions of the Prohibition Act, it was void. If it was void, he could not be held guilty of contempt of court in acting in defiance of it.

It was further explicitly held that there was no evidence that he had violated the injunction against manufacturing or having in his possession any intoxicating liquor on the premises described in the decree. That is the state of the record now before us. It is not claimed the offense was committed on the premises described in the injunction order. The court held that where persons travel and vend liquor in their possession on their person or in automobiles or other conveyances, the statute declares such conduct a nuisance. It was further held that that was the sort of nuisance against which an injunction was effectual and operative throughout the county and state. If that case does not involvethis identical injunction, it involve one like it in every respect. At all events it is conclusive of this case.

The judgment of the County Court of Christian County is reversed.

Reversed

Gen. No. 7934

Agenda 56

October Term, 1925

Wiley M. Teal, Appellee

vs.

Elizabeth Teal, Appellant

241 L.A. 637

Appeal from the Circuit Court of DeWitt County

CROW, J.

Wiley Teal on May 2, 1924, filed a bill for divorce charging his wife with extreme and repeated cruelty. He avers he was married to her at Bloomington, September 28, 1910, and ceased to live with her May 1, 1924. The bill contains averments that he always treated her with kindness and as a true and indulgent husband and supplied her wants and necessities according to his means and their condition in life. That there was one child born to the marriage, Ray Teal, who was twelve years old on the third day of January, 1924.

He avers that defendant has been guilty of extreme and repeated cruelty toward him; that she has temper and during six or more years indulged in sallies of passion and obscene, profane and abusive language without any provocation and refused to perform household duties. That complainant did not resent the use of violence on account of the sex of defendant. That about January 10, 1914 defendant struck, kicked and scratched complainant in a violent manner. That for seven years past she struck, scratched and kicked him ten or twelve times; that she struck him with a broom, using each end of the broom and that while angry she jabbed him in the face with the brush end of it. That she threw sticks of wood at him when angry, most of which he dodged; that she repeatedly threatened to cut his heart out and cut him through and kill him with the butcher knife, and with a stove hook. That when angry she burned hats and caps of complainant, tore his coat into shreds, tore up his razor case, threw his razor away, and wilfully destroyed other articles of his personal

property; that she did not allow neighbors to visit him and made it unpleasant for him; prevented him from reading the newspapers and especially the Clinton Register; she spit in his face, called him vile and obscene names on the slightest provocation and unnecessarily whipped and beat their child Ray, so that he stands in terror and fear of her.

It is further averred that on January 23, 1920, without any provocation defendant assaulted and beat complainant. That he has varicose veins and sores on his legs and that she kicked him on the sore spots and caused extreme suffering and agony. That at the same time she struck him with her hands and fist, tried to scratch his face, swore violently at him, brandished a butcher knife and threatened to run him through with it. That in the fall of 1922 she scalded complainant with boiling water and during that year threw brick-bats, sticks and other missiles at him; that during that year she struck and slapped him while angry on an average of once every ten days, and violently slapped him in the face.

The bill avers that on February 10, 1923, complainant filed a bill for divorce from defendant and obtained a temporary injunction restraining her from coming on the premises occupied by him and from making threats against him, or doing him any physical or bodily injury, or in any manner interfering with him or with the custody of the child, Ray. That notwithstanding the injunction she went back to the home and refused to leave; that he procured a rule against her to show cause why she would not be adjudged in contempt; that against the rule she answered she was in the home with the consent of complainant and at his request and that they were living and cohabiting together as husband and wife but that said statements were untrue. There are averments of other indignities, threats and display of anger and that on April 25, 1924 she struck him a violent blow on the back of the neck while he was washing dishes, because he was in her way. That on the first day of May 1924, complainant left the home and that

appellee is living

in it on his farm.

Defendant filed an answer denying every charge against her of cruelty and mistreatment, made by complainant. She also filed a plea of condonation of the offenses charged against her. Upon the bill, answer, plea and replication the cause was tried before a jury which found for complainant. The court having denied defendant's motion for a new trial, rendered a decree for divorce and for custody of the child, reserving the matter of adjustment of property rights to future disposition. To reverse the decree this appeal is prosecuted.

Many errors are assigned and covered in the brief of appellant. Those prominently urged are, the evidence does not establish that appellee was guilty of extreme and repeated cruelty within the meaning of the divorce act; that appellee is barred of any right to a decree on the ground that he condoned the acts of appellant, if they constitute a ground for relief; errors in instructions, ruling on evidence; failure of the court to protect defendant against public demonstration during the trial and others.

In determining the merits of the first contention, examination of the legal principles applicable will afford much assistance in construing the statute. The statute provides that where a husband or wife has been guilty of extreme and repeated cruelty, the other shall be entitled to a divorce on that ground. **In Duberstein v. Duberstein, 171 Ill. 133 applying the statute, it is stated (139):**

"It is now the settled rule in this state that, where the husband asks for a divorce from his wife upon the ground of extreme and repeated cruelty, he must make out a clear case; and it is not sufficient for him to show slight acts of violence on her part towards him so long as there is no reason to suppose he cannot protect himself by a proper exercise of marital powers. **(DeLaHay v. DeLaHay, 21 Ill. 252; Fritz v. Fritz, 138 id. 436; Aurand v. Aurand, 157 id. 231)''**.

In the DeLaHay case, a suit by the husband, Mr.

Justice Walker said:

“While the general principles of law are the same, whether the suit is instituted by the husband or the wife, in the application of these principles it is necessary to consider

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the relative rights which the marriage has created, and perhaps the physical constitutions and temperaments of the parties. And it must, therefore, be a clear case which will induce the court to grant a divorce on the application of the husband for the cruelty of the wife.”

In the **Garrett v. Garrett**, 252 Ill. 318 (322), the principle of the foregoing cases is again stated, the court further saying:

“The mere violence of the wife from which the husband can easily protect himself is not cruelty. The husband may protect himself by using necessary force, but he must not retaliate by giving blow for blow”.

It should be noticed that in the latter case the court omits the qualified statement of the duty to consider the “physical constitutions and temperaments of the parties”, found in the DeLaHay case.

In **Trenchard v. Trenchard**, 245 Ill. 313, the court approving the previous judicial definition of cruelty authorizing a decree for divorce, said (315):

“What is meant by cruelty, as used in our statutes, has been construed to mean physical acts of violence; bodily harm such as endangers life or limb; such acts as raise a reasonable apprehension of bodily harm and show a state of personal danger incompatible with the marriage state. Bad temper, petulance of manner, rude language, want of civil attentions or angry or abusive words are not sufficient grounds for divorce for extreme and repeated cruelty. (**Henderson v. Henderson**, 88 Ill. 248; **Harmon v. Harmon**, 16 id. 85; **Embree v. Embree**, 53 id. 394; **Vignas v. Vignas**, 15 id. 152; **Fizette v. Fizette**, 146 id. 328).***** The dissolution of the marriage relation is a grave matter and can only be justified where the case is strictly within the statute. Our statute is sufficiently liberal in enumerating the causes for which a divorce may be granted,

and it has always been the policy of this court that parties seeking divorce shall bring themselves within the statute."

The parties were married September 20, 1910 and lived on his farm of 220 acres. They have one child, a boy 12 years old. Appellee is sixty-five years old and weighs 225 pounds. Appellant is 49 years old and weighs 114 pounds. She has been sick a great part of the time of their married life. She is crippled and has undergone several surgical operations, one of which was for goiter. She is afflicted with bronchial trouble.

The testimony shows that complainant and his wife did not live harmoniously. The cruelty of which he complains, according to his testimony, began on the tenth day of January, 1914,

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when she slapped him in the face and kicked at him. She kicked him on the leg which he says was tender, and on account of varicose veins bled, and the blood ran down in his shoe. She frequently struck him with the broom when she was angry. She struck "as hard as she could with the broom part" and tried to jab him in the face, and jabbed him in the stomach with the handle. It was painful, he says, and he tried to catch the broom. That happened fifteen or twenty times in the last ten years. When angry she frequently called him a vile name. That happened more than a dozen times. She most frequently talked that way in 1922 and 1923. He remembers nothing about that in 1924. In the fall of 1922 she threw boiling water out of the tea kettle on him. He was standing by the side of the porch and had had no trouble with her. "She stepped out and threw the water" on him. He could not say what she said. She was angry. The injuries pained him for several days. On the twenty-fifth of April he was washing dishes "and she got angry because she said I got in her way, and she gave me a powerful blow on the back of my neck with her fist. She was mad". On another occasion he says she threw a stick of stove wood about two inches in diameter and 14 or 16 inches long at him, hitting him on the shoulder. It "glanced off

and fell about 8 or 10 feet from where I was. She was about twenty feet from me when she threw it. It didn't knock me down, but it was painful. I did not examine my shoulder to see if it was black and blue. It hit me on the right shoulder. I was facing east and she west. I was not trying to get away from her. I did not know she was going to throw it until she threw it. We were not fussing or quarreling about anything." This testimony was all denied by appellant.

The foregoing are all the acts of physical violence inflicted on appellee by appellant. He testified to numerous "threats" to take his life, to run him through with the butcher knife, or to cut his heart out with it. He also testified that she threw brick-bats, rocks, a hammer and sticks of wood at him,

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but with the exception of one time, they all missed him. On some occasions he testified he took the broom away from her. On one occasion he held her arms so she could not fight him and that was the time when she said he was the "ornriest white man she ever saw". During all this time, except on two or three occasions when he left the home and was gone for several days, they lived in the same house. She generally in later years occupied one bedroom and he another, both opening off the dining-room. He says she would talk to him and keep him awake after going to bed. Sometimes she was pleasant and sometimes not.

It is clear from the language of the statute and the declared policy of our law against encouragement of divorce, that cruelty, as a ground for divorce, consists only of such acts as render personal existence insecure, or personal safety in grave peril. This policy is emphasized by the declaration from the earliest cases that a distinction must be observed between acts of cruelty charged against the wife and those charged against the husband. The cases regard sex, age, relative size and physical strength of the parties as proper and necessary elements to be considered. The marital relation is the basis of our society. Therefore its dissolution is not encouraged and cannot be allowed ex-

cept upon a showing of extreme grounds.

Not only the language of the Supreme Court in the cases varying slightly according to the Judge expressing its judgment but every provision of the statute authorizing divorce, abound with the expressed policy against divorce. In no case can it be allowed unless the evidence is sufficient to establish at least one of the grounds in the statute authorizing it. The ground must be clearly established. To doubt the existence of the ground charged with its necessary character, requires a denial of the relief sought. The legislature has declared some grounds for divorce sufficient without regard to degree of the offense. They are adultery, natural impotency, existence of a previous marriage, attempt to take the life of a spouse by poison or other means

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showing malice, conviction of a felony or other infamous crime, and lately, that one has infected the other with a communicable venereal disease. But cruelty as a ground for divorce in this state is qualified. Cruelty cannot be successfully invoked as a ground for divorce unless it possesses two qualities—it must be extreme in degree and in that degree must be repeated.

So strict and solicitous has the Supreme Court, in construing the divorce act, guarded the marital relation, that it held void a provision of the statute of 1845 authorizing courts of equity to grant divorces for "all causes not provided for by any law of this state." **Birkby v. Birkby, 15 Ill. 120.** In that case the principle of construction of the clause now under consideration was stated by Mr. Justice Caton:

"Where the offense charged is of a character provided for in the statute as a specific cause for divorce, the degree of the offense must be measured by the statute; and where it does not come up to that standard the courts have no legal right to say that an offense of the same character, but less in degree, shall be sufficient to dissolve the marriage contract. Where the legislature has prescribed one measure of guilt as necessary, the court cannot say a less will be suffi-

cient."

Applying the well established principle announced so often to the facts in this record, on the question of extreme and repeated cruelty, the evidence does not make a case favorable to complainant. He is a robust man who is not in ill health. She is small, sickly, a victim of the surgeon's knife, one of the several operations being for goiter. Two of her toes have been amputated. It is not in evidence, but what the generality of mankind knows we are not forbidden to assume, that the goiter left her nervous and eccentric. At her age and in her physical condition, nature's processes are tardy. The trend physically has been constantly downward. So far as the evidence discloses, she has had only the help he has rendered, though the housewife on a large farm, with gardens, fowls, and the usual accompaniments of rural life. Considering the unabridged evidence of the two parties as contained in the record, there is nothing creditably convincing that she was slack in her household affairs. He testi-

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fied: "I helped wash the dishes for several years and I think I have helped wash them all the time. She got the meals when she was able to. She has been sickly a good part of the time, and that is one reason that she never worked so awfully much. She is lame now and has been for the last four years." It is not likely the entire record considered that he overstated her service, energy or physical condition.

The inference that Mrs. Teal was a nervous and eccentric person is supported by the fact that her husband instituted an inquest of insanity against her and testified at the hearing she was insane. It seems that her brother, who did not appear at the trial in this case, began the proceeding but Teal was consenting to it. At that time a bill filed by him for divorce was pending. But they were living together. On trial by jury in the County Court she was found not insane and the present bill for divorce was filed immediately afterward. The summons in this suit was served on the same day, after the verdict in the insanity pro-

ceeding. On February 10, 1923, the first bill for divorce was filed by Teal and an injunction was issued restraining her from going upon the premises, the home of herself and husband. As shown by the present bill, on a hearing upon citation she purged herself of contempt by evidence that she was living with him in the home, and she was discharged. The former bill was not dismissed until after the present bill was filed.

These facts show that he had not, as he averred in his bill, "always treated her with kindness and as a true and indulgent husband". The record shows that for the last five Sundays before the filing of the present bill special grounds for complaint are put forward. He testifies that she closed the doors and would not allow him to go in the house. That he kept warm by sitting on something along the side of the house where the wind would not blow on him and where the sun was warm. That sometimes he kept warm by going into the smoke house or the hen house.

Let it be assumed this story is true, though she denies

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it. It is apparent that he was not compelled to stay out of the house. He says she would tell him he need not come in yet. But it was his home. He was not afraid of her. The evidence does not show he was in danger. The conduct was not cruelty of the sort permitting a divorce. But if the door was closed he would have been amply protected in the exercise of his marital powers—the right by force to break the hook holding the screen door or the lock fastening the inner door. No one exercising his judgment in the ordinary affairs of men can believe that he was compelled to stay in the hen house to keep warm. No one is required to believe a story though delivered under sanction of an oath, if it is unreasonable, and this story is unreasonable. Why this five-Sunday culmination of this episode in the marital life of these people? The unsuccessful insanity inquest and the present bill for divorce were part of it.

The statement in the bill that complainant did not resent his wife's use of violence on account of her

sex, is nothing in aggravation of her acts and contributes nothing to the merits of his case. He had no right legally or morally to resent it. But he had the right, and it was his duty to exercise his marital powers to prevent injury from her acts. If by the exercise of those powers he could prevent it, the decided cases hold there was no cruelty. To complacently allow her to strike him if he could prevent it, was invitation and consent. The growth of this doctrine is interesting and instructive. It is a natural growth from the fertile field of the declared policy against divorce constantly reiterated in the decided cases.

Complainant was required to make out a clear case to entitle him to divorce. *Aurand v. Aurand*, supra. By a "clear case" is meant the establishing of acts that without more must be denominated cruelty; but the evidence must show in addition that he was not able to protect himself from the consequences of those acts by authorized powers. An act against which he could so protect himself is not cruelty. (*Garrett v. Garrett*, supra). In the

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Garrett case the term "marital powers" is described. It is in keeping with the policy of the law affecting the relation. It may be defined thus: "By marital powers of the husband is meant the exercise by him of necessary force in resistance to threatened injury by acts of the wife, such resistance not extending to retaliation by giving blow for blow". The *Garrett* case was one where the wife was suing. The principle, under all the cases, is much stronger against the husband seeking a divorce.

The evidence in the case does not show he could not protect himself against the consequences of the alleged acts of cruelty, if clearly proven, by the proper exercise of his marital powers most favorably considered. He did so on some occasions. The relative size, strength and physical condition of the parties are convincing considerations that show he could always do so. He utterly failed in proof of this element and therefore did not make the case of extreme cruelty charged in the bill. Most of the acts complained of were at-

tacks with a broom. It cannot be matter for doubt as to his ability to protect himself against them although he says "she was mighty quick."

Cohabitation as an element of condonation does not mean sexual indulgence. In many of the cases for divorce on the ground of extreme and repeated cruelty the courts have said the cruelty must be such as to render it unsafe for the complaining party longer to cohabit with the offender. Cohabitation in the special sense certainly was not in the mind of the court writing the opinion. That expression could only have been used in the sense of dwelling together, living in the same habitation. As long as the parties do so live, one cannot successfully complain of the other for the purpose of dissolving the relation.

We do not notice the unusual scenes and prejudicial conduct, that transpired in the court room during the progress of the trial. Nor do we notice here the prejudicial evidence of acts not proper for consideration at the trial. While the environment was such as to deny a fair trial to appellant, we

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decline to pass upon the record in those respects because in our opinion, complainant did not make out the clear case warranting the court in granting him any relief.

For the reasons indicated the decree of the Circuit Court is reversed with judgment against appellee for costs.

Reversed.

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October Term, A. D. 1925

Clara L. Janssen, Cross Complainant, Appellee,

v.

H. Fred Janssen, Cross Defendant, Appellant.

Appeal from the Circuit Court of Sangamon County

SHURTLEFF, J.

This is an action for separate maintenance. There has been much litigation between the parties. They were married in 1899, and have two children, a son now of age, and a daughter over seventeen years of age.

At the time of the marriage of appellee to appellant, her father had died leaving her a considerable estate. Upon the death of her mother, years later while appellee and appellant were living together happily, appellee was the heir to the greater portion of her mother's estate. She inherited approximately twenty thousand dollars in money and property from her parents. Appellant was an employee in a greenhouse in the City of Springfield, earning a small salary of seven dollars a week. He was of a frugal and saving disposition and had saved a small amount of money, possibly three or four hundred dollars. After their marriage appellee provided the means to establish appellant in a greenhouse and seed business of his own. He invested her funds wisely, sold her property and bought other property, in fact, had the benefit of the entire fortune of appellee. His investments were wisely made, and he became a hard working, industrious

business man, and from her money and his own subsequent efforts in business with her assistance he accumulated the property which the evidence shows. Appellee was very much of the same nature, economical, industrious and worked with appellant in accumulating the property that was owned at the time of the various trials. The first building which was a three-story business building within a half block of the public square in Springfield, with a frontage of forty feet, was principally paid for by appellee's money. He occupied one of the store rooms with his business for more than ten years and rented the remainder at a rental in the neighborhood of two hundred dollars a month, collected the rents and paid out the mortgage or vendor's lien note in that period of time for the remainder of the purchase price. This property was deeded to appellee and cost in the neighborhood of thirty-five thousand dollars. This is the property the court values at sixty thousand dollars in the decree as appellee's property.

The other property acquired by appellant he took title to in his own name, including the Marquette Hotel building in Springfield, which contained some twenty rooms excluding the basement and lobby, which was used for hotel purposes, excluding the apartment occupied by appellee. Appellant admitted that eight thousand dollars of appellee's money was included in the purchase price of the Marquette Hotel building.

The relations between appellee and appellant had been agreeable up to the 13th of February, 1922, when appellant, without giving any reason and having no cause whatsoever, packed up his clothing and left the apartment where they had been living and went to live in another part of the city with his mother and family. Within a few days thereafter appellee was served with a summons issued by the County Court of Sangamon County to appear

and answer a petition filed in said court by appellant charging that she was insane, and prayed that upon a hearing of said petition, as provided by law, she be committed to a sanitarium or hospital for the insane.

Appellee answered said petition, a trial was had in which appellant testified, and appellee testified before a jury and evidence was taken on behalf of the petitioner and on behalf of appellee, upon which the jury returned a verdict finding appellee to be sane and the petition was dismissed.

Prior to this time appellant had caused appellee to be committed, against her will, to a private sanitarium at Jacksonville and upon a commission of two physicians appointed by the County Court of Sangamon County she was adjudged insane, which insanity grew out of some nervous troubles she had had. Appellee was committed to the Illinois State Hospital for the Insane at Jacksonville where she was kept under the surveillance of physicians for about three weeks, declared to be of sound mind and discharged.

After February 13, 1922, appellant did not live with his wife or children and did not provide them with necessary clothing or the necessities of life, as he should have done according to his income and financial ability. He did provide them with two meals a day at the restaurant connected with the Marquette Hotel and they continued to occupy an apartment in the hotel, consisting of five rooms, which was separated from the other rooms in the hotel by a hallway.

Some time after the insanity trial of appellee in Sangamon County, appellant, having returned to the hotel and occupied various rooms, filed a bill against appellee for divorce on the ground of desertion, and there was a trial by jury which found a verdict in favor of the defendant, appellee, and there was a

decree at the May Term, 1924, dismissing appellant's bill for want of equity.

This suit was started by appellant filling his bill for divorce against the appellee to the September term 1924 of the Circuit Court of Sangamon County, charging adultery. Appellee answered the bill fully and presented a cross bill for separate maintenance, charging that she was living separate and apart from appellant without any fault on her part and among other things charging appellant with adultery.

There were answers and replications filed and an issue of fact was made up in the divorce case, which was the original bill and answer thereto, as follows:

First: Has the defendant Clara L. Janssen committed adultery with David Beck prior to August 18, 1924?

Second: Has the complainant H. Fred Janssen committed adultery with Marie Neuber prior to August 18, 1924?

This cause was submitted to a jury in October, 1924, and upon the proofs submitted the jury answered "no" by its verdict to each interrogatory. The original bill of appellant was dismissed for want of equity and the court referred the cross bill to the master to take further proofs and to consider the evidence taken before the jury on the original bill as part of the proofs on the cross bill and to report ^{the} findings to the court. ~~The master's findings supported the allegations of appellee's cross bill, and exceptions to the report having been duly heard before the court and overruled, a~~ decree was entered in favor of appellee, granting her separate maintenance and appellant has brought the record to this court for review. As to the property rights of the parties the decree finds that appellant is the owner of property of the value of 148,400, subject to an encumbrance of \$74,300, leaving a net value of \$74,100, and that

appellee

is the owner of real estate of the value of sixty thousand dollars, and that the net value of the property owned by both is \$134,100; that the net annual income of the appellant is \$11,146 and of appellee is \$3,482. Appellant was decreed to pay \$1,000 per annum to appellee and appellee and her daughter are permitted to live in the apartment rooms at the hotel as now occupied by them, or in case they should vacate those rooms appellant is to pay the further sum of fifty dollars a month to provide rent for a home or other apartments for his wife and daughter. The decree also provides that appellant pay forty dollars a month for his daughter's support until she becomes of age. We do not understand from the briefs that there is any particular complaint made as to the findings of amounts of property owned, or the amount of the net incomes, or the particular terms of the decree if it is found that appellee is entitled, under the testimony, to separate maintenance. It is contended very strenuously that appellee is not entitled to separate maintenance. It is argued upon statements and contentions of appellee in this record that she is insane, but that is not the issue before this court, having been settled by a verdict and judgment of the County Court of Sangamon County from which no appeal has been taken, and we shall not discuss it here either to the disadvantage of appellee or appellant.

It is contended that the decree is manifestly against the weight of the evidence. We have examined the record with great care and have read all the testimony. There are portions of it, in behalf of appellant, recited in the statement of the proceedings, that speak for itself and with a voice that does not appeal to a court of equity. We are firmly of the opinion that the decree is not against the weight of the testimony whatever the weaknesses of appellee may be. (*Hamaker v. Hamaker*, 18 Ill. 137.)

Appellant contends that the decree is erroneous and that the wife is not entitled to separate maintenance because the wife and husband, although living in the same house, are occupying different rooms and eating at different times, citing **Lowe v. Lowe**, 213 Ill. App. 607; **Klemme v. Klemme**, 37 Ill. App. 54; **Smith v. Smith**, 156 Ill. App. 176; **Rathman v. Rathman**, 196 Ill. App. 20, and kindred cases. The doctrine of the cases cited, in so far as they adhere to the rule stated, is, that husband and wife, living in the same home, under the same dominion, although sleeping in separate rooms and eating at a different table, are not living separate and apart from each other. But in **Cooper v. Cooper**, 160 Ill. App. 449, the wife was living in the home of the husband and receiving sums of money for her support from the husband, who was spending the winter in California and living in a state of adultery with another woman. The court held: "If the allegations of the bill be true, it would not be questioned but that the appellee would be justified in leaving the home if appellant should return to live there, and that appellee is entitled to a decree of separate maintenance." In **Rathman v. Rathman**, *supra*, the court held: "That in order for the wife to recover in a suit for separate maintenance, it must appear that the parties are actually living separate and apart at the time the bill is filed." A hotel is not a home in the sense used in the cases cited by appellant, and under the proofs in this case appellee was living separate and apart from appellant by his fault from February 13, 1922, to August 18, 1924, upon which date appellant filed his bill for divorce against appellee, charging adultery, following which appellee filed her cross bill for separate maintenance. Certainly appellant, since the filing of his bill for divorce charging adultery, cannot claim that he and his wife have been living

to-
gether as husband and wife from the sole fact that they have each lived portions of the time in the same hotel. At the Marquette Hotel appellee and sole control and dominion over the suite occupied by her and her children, which rooms were separated from other portions of the hotel and the balance of the hotel was managed by Leonora Martin. If appellant's bill for divorce did not bar him from raising the question, this is not such a living in a home or under the same roof as estops appellee from claiming that she was living separate and apart from her husband.

Finding no error in the decree of the Circuit Court of Sangamon County, the decree of that court is affirmed.

Affirmed.

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*On petition for Rehearing, Opinion
modified and Rehearing denied.*

Gen. No. 7944

Agenda No. 45

October Term, A. D. 1925

241 L.A. 637

Lottie Askins, Appellant,

v.

Verna Williams, et al. Appellees

Appeal from the Circuit Court of Shelby County
SHURTLEFF, J.

The error assigned upon the record in this cause is the refusal of the court to apportion the solicitor's fees of complaint in a partition suit against all of the interests in the land.

A hearing was had and it was stipulated that if the solicitor for complainant was entitled to have his fee assessed, \$325 should be allowed, but it is earnestly insisted by the solicitors representing Amy Holt and the Shelby Loan & Trust Company, appellees, that this is not a proper case to allow solicitor fees and that the solicitor for complainant is not entitled to have any amount taxed and paid as costs.

On January 26, 1920, Rachel L. Williams, a widow, died intestate, leaving as her only heirs her sons, Oliver Williams and Buckner Williams, and her daughter, Mary Amy Holt, and her grandchildren, Lottie Askins, Walter E. Williams and Verna Williams, children of a deceased son, George F. Williams, all adults. At the time of her death she was the owner of lands in Shelby County, which for identification may be termed the fifty-seven acre tract, the two acre tract and the three acre tract. On September 1, 1914, she executed and delivered to the Trevett-Mattis Banking Company of Champaign, Illinois, a mortgage on the

fifty-seven acre tract to secure the payment of \$1,500 at 5½ per cent interest. This sum became due by an extension agreement on September 1, 1924. On March 5, 1919 she executed and delivered to John D. Miller a mortgage on the two acre tract to secure the payment of a note for \$600 due five years after date with seven per cent interest. Both these mortgages were unpaid at the time of her death and were valid and subsisting liens upon the premises so mortgaged. Her estate was properly administered and has been fully and finally settled. On April 2, 1923, the said Oliver H. Williams and his wife and the said Buckner Williams executed and delivered to the Shelby Loan & Trust Company of Shelby County, their mortgage covering all three tracts of land and in addition two strips of land just north of and adjoining tract number three. These two strips are not involved in this proceeding.

The mortgage to the Trust Company was given to secure the payment of the two notes aggregating \$5,000. On January 1, 1925, W. P. Nasworthy recovered in the County Court of Shelby County a judgment against the said Buckner Williams and Oliver H. Williams for \$651.53. On January 3, 1923, the State Bank of Lakewood recovered a judgment for \$459.75 and \$11.45 costs, in the Circuit Court of Shelby County against Oliver H. Williams, and on the same day and in the same court recovered a judgment for \$242.13 and \$11.45 costs against Oliver H. Williams and Ruth Williams, and on the same day and in the same court recovered a judgment for \$187.99 and \$8.35 costs against the said Buckner Williams.

The foregoing facts appeared of record in Shelby County at the time appellant, on February 19, 1925, filed her bill for partition. The bill correctly described the three tracts of land and correctly recites the death, heirship and seizure of the deceased, and correctly recites the execution of the mortgages by deceased to the Trevott-Mattis Banking Company and to John D.

Miller, and correctly sets forth the execution by Oliver H. Williams and wife and by Buckner Williams of the mortgage to the Shelby Loan & Trust Company, and correctly refers to the book and page where that mortgage appears of record; but in describing the real estate covered by that mortgage the bill only describes the fifty-seven acre tract and the two acre tract. After referring to these three mortgage liens the bill then represents that the ancestor, Rachel L. Williams, at the time of her death was seized in fee of the fifty seven acre tract and the two acre tract only. Then it recites that no person or persons other than the complainant and Verna Williams, Walter Williams, Oliver Williams, Buckner Williams, Amy Holt, Trevett-Mattis Banking Company, John D. Miller and the Shelby Loan & Trust Company, defendants, have any interest in or title to said lands or any part thereof, in possession, remainder, reversion or otherwise. The bill later avers the death of John D. Miller and asks for summons against Della Miller, his legal representative and executor.

A summons was issued and served on Oliver Williams, Buckner Williams, Amy Holt, Della Miller and the Shelby Loan & Trust Company. The defendants, Verna Williams, Walter Williams and the Trevett-Mattis Banking Company entered their respective appearances. Answers were filed by the Shelby Loan & Trust Company, Oliver Williams, Buckner Williams and the Trevett-Mattis Banking Company. On March 23, 1925, the State Bank of Lakewood filed its petition to be made a party defendant and, leave having been granted, filed its answer on May 6, 1925. Leave was also granted W. P. Nasworthy on March 23, 1925, to become a party defendant and on May 6, 1925, leave was granted him to file an answer but no answer of his appears in the files. On May 9, 1925, complainant filed her application for the appointment of a receiver and

in that application only the fifty-seven acre tract and the two acre tract were described. No replications appear in the files but the minutes of the court show the filing thereof, and the defendants, including Amy Holt, not answering and having been defaulted, the cause was referred to the master.

A decree of partition was entered and commissioners were appointed to make partition. The commissioners reported that the lands were not susceptible to partition and appraised the fifty-seven acre tract at \$3135, the two acre tract at \$1,500 and the three acre tract at \$300. A decree of sale was entered which did not determine or state whether the lands were to be sold subject to or free from the encumbrances and the liens transferred to the proceeds of sale.

Upon the sale, appellant, through her solicitor, stipulated with the solicitors for the various mortgagees and the master that the lands should be sold free of the mortgage liens and such liens transferred to the proceeds of sale of the various tracts. This stipulation was carried out and reported by the master to the court and the report of sale was approved. On offering the lands for sale separately there was a bid of \$3,300 for the fifty-seven acre tract, \$1,900 for the two acre tract and \$200 for the three acre tract, and thereupon the master offered for sale and sold the three tracts together for \$6,475 to appellee, the Shelby Loan & Trust Company, and the court approved the sale. There was an order of distribution that the Trevett-Mattis Banking Company be paid the sum of \$1,668.59 out of the fund, which included a solicitor's fee of \$75, as provided in its mortgage; that Della D. Miller, executrix, be paid the sum of \$872.48 for the amount of her mortgage, which included a solicitor's fee of \$50, as provided in her mortgage; and it was further decreed that the Shelby Loan & Trust Company was entitled to recover from Oliver Williams and Buckner Williams the sum of \$6049.40, which included a solicitor's fee of \$150, according to the terms of

its mortgage, and that there was a deficiency of proceeds belonging to said Oliver Williams and Buckner Williams with which to pay said indebtedness. The court ordered the payment of the court costs and master's fees, amounting to \$230.15, and further ordered that the sum of \$500 remain in the master's hands to abide the determination as to payment of the solicitor's fee of appellant. Otherwise distribution was ordered of the proceeds of sale. Appellant has appealed.

Appellee Shelby Loan & Trust Company succeeded, by mortgage, to all of the interests of Oliver Williams and Buckner Williams in and to said lands, each of whom, by the decree, was found to be the owner of a one-fourth interest therein, "subject to the said mortgages and judgment liens."

Appellees claim there were many defects and inaccuracies in the bill and in the proceedings, and we shall attempt to set out and discuss only a few of them. The bill did not make the judgment creditors of Oliver and Buckner Williams parties defendant and they employed solicitors and came into the case by separate and independent petitions. These judgment creditors were necessary and proper parties. (*Smith v. Higgins*, 152 Ill. 167; *Mansfield v. Wallace*, 217 Ill. 624; *Finlen v. Foster*, 211 Ill. App. 613) All of the mortgagees are necessary and proper parties. (*Kilgour v. Crawford*, 51 Ill. 249; *Barr v. Barr*, 273 Ill. 621; *Mansfield v. Wallace*, *supra*, and *Finlen v. Foster*, *supra*, and the numerous cases cited in that case.) In *Scanlon v. Cobb*, 85 Ill. 296; *Clark v. Manning*, 95 Ill. 580; *McGraw v. Bayard*, 96 Ill. 146; *Vogle v. Brown*, 120 Ill. 338, and other cases, it has been held that where trusts deeds are involved both the trustee and the note holders are necessary and proper parties. In *Finlen v. Foster*, *supra*, Mr. Justice Dibell said: "It is obvious that the

interests of the defendant owners would have been prejudiced by leaving the record in the condition set forth in the amended bill. If partition had been made the lien of this debt would still have rested upon this whole farm, because the holder of the notes secured by an undivided interest therein had not been made a party. In case partition had been made, he had a right to test the question whether one-seventh in value of the land had in fact been set off to the maker of his notes, for, if not, it might not be sufficient to pay his debt. Manifestly, in case of a sale, the fact that the holder of these notes was not a party to the suit would tend to cloud the title to the land and would be calculated to prevent its selling for its full value. The solicitors for certain of the defendants, appellants here, hunted up the holder of these notes, Edward Radigan, and caused him to file an intervening petition, asking to be made a defendant, and he was made a defendant and thereby the interests of the parties were protected."

Finlen v. Foster, supra, involved mortgages given by individual heirs and not by the ancestor, and fully answers appellant's contention that the bill is sufficient if it sets out correctly the direct portions owned by the heirs.

In this case appellee Shelby Loan & Trust Company held a mortgage covering all three tracts. The bill charged that this mortgage covered the fifty-seven acre and the two acre tracts only. Appellees, by their answers, denied that the descriptions set out in the bill were correct and furnished true and correct descriptions. The bill charged that no other person or persons other than appellees Verna Williams, Walter Williams, Oliver Williams, Buckner Williams and Amy Holt, Trevett- Mattis Banking Company, John D. Miller and the Shelby Loan & Trust Company have

any interest in or title to said lands or to any part thereof, in any manner, and the bill prayed for a partition and division of said lands. The court entered a decree of partition in the usual form, but finding the amount of the indebtedness of the various mortgagees and judgment creditors and finding the interest of the several owners and decreeing that the said lands should be taken and held subject to the respective mortgage and judgment liens. Upon the report of the commissioners that the lands were not susceptible to division and partition there was a decree of sale, which directed the master to make sale of the lands following the form of the decree for partition. The liens against the lands of Oliver Williams and Buckner Williams far exceeded the value of their interest in the land and under the decree of partition and the decree of sale the master could only sell the lands subject to the liens. In other words, the master was powerless to sell the lands at all in pursuance of the decree of sale, and the lands were not sold in pursuance of said decree but by stipulation of the parties and their respective solicitors who had answered and appeared in the cause. This amounted substantially to an abandonment of the bill and decree of sale and a sale of the lands by a portion of the parties interested by common consent. Whether all of the owners and parties interested have accepted their portions of the proceeds of sale is not shown by the record, and whether the proceedings instituted and attempted to be carried through have resulted in a family settlement or further clouded the title to these lands, it is yet too early to determine.

Section 40 of chapter 106 (Smith-Hurd's Rev. Stat.) provides: "In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the partition or bill, the court shall apportion the costs among the parties in the interest in the suit, * * * including a reasonable solicitor's fee for the complainant's

solicitor," etc.

Section 6 of the same act provides: "Every person having any interest, whether in possession or otherwise, and who is not a petitioner, shall be made a defendant to such petition." Under this section it has been held that mortgagees and judgment creditors, not only of the ancestor but of the heirs and co-parcensors are necessary and proper parties. It is further necessary when a complainant or petitioner has knowledge or can ascertain the interest of a party defendant, to set out and describe such interest correctly in order to obtain the benefit of the statute in apportioning costs.

In the opinion of this court the Circuit Court of Shelby County committed no error in denying appellant's petition and the decree of that court should be affirmed.

Affirmed.

Anna Crabtree, Appellant,

vs.

Lee S. Crabtree, Appellee.

241 I.A. 637

Appeal from the Circuit Court of Champaign County;
SHURTLEFF, J.

This appeal arises out of a suit for divorce instituted by Anna Crabtree, the appellant, against Lee S. Crabtree, appellee, on a bill of complaint filed on August 22, 1924, charging willful desertion on the part of her husband for a space of more than two years. The defendant appeared in court and filed an answer and resisted the application for divorce, and also filed a cross bill charging desertion upon the part of his wife, but upon the trial stated that he was not pressing his claim for divorce and desired to live with his wife.

After presenting the original bill, appellant, on June 15, 1925, presented a supplemental bill charging appellee with having been indicted and convicted in the United States court, Northern Division of the Southern District, of violating the Federal law in using the mails for non-mailable matter, and appellee was fined in the sum of five hundred dollars for such offense. The offense charged and the conviction thereof was alleged to have taken place after the filing of the original bill and the offense charged, being punishable by fine or imprisonment in a Federal prison, under the laws of the United States, was denominated a felony. The court sustained a demurrer to the supplemental bill, which is assigned as error.

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Appellant, Anna Crabtree, and appellee, Lee S. Crabtree, were married on September 15, 1897, and shortly after their marriage lived on a farm near New Philadelphia, in McDonough County. Their domestic life upon the farm was very happy and both took a great interest in their only daughter who attended the public schools and won a scholarship in the Normal University at Macomb.

The husband and wife both decided that the daughter should have the benefits of this scholarship and that when she had completed her course at the normal school she should be educated at the University of Illinois at Urbana. Under this mutual understanding and arrangement, the mother and her daughter moved to Macomb about the year 1915, and the father remained upon the farm, assisting as best he could. The mother rented a

house in Macomb and took in roomers, and the father made a trip to St. Louis and bought furnishings for the house. He also brought in produce from the farm and assisted in the payment of the grocery bills and the rents and also paid the coal bills and otherwise assisted the family in their efforts to give the daughter an education.

About the year 1918 Mr. Crabtree became involved financially and he was compelled to sell part of his farm. The daughter, having completed the course of study at Macomb, taught school for two years and in conformity with an understanding of the father and mother, dating back to the daughter's youth, she was to have a university education. Appellant desired to go with the daughter to a university center. They decided on the University of Illinois and mother and daughter moved to Urbana, taking with them certain household goods and leaving certain household goods in Macomb for the use of appellee who desired to continue in the conduct of his real estate business.

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Appellee at that time had not decided as to the place where he would locate but told his family that he would locate in Peoria or Springfield. He was present at the time of the departure of his wife and daughter. He had been in Peoria and wrote his wife from there stating that when she got ready to move to write him and he would come down to Macomb and help pack. She had written him, telling him of the time of their departure.

Appellant and the daughter moved to Urbana about August 10, 1922. They heard nothing from appellee from that time until about Christmas in 1922, when they each received a Christmas card, but no address. The daughter thought the post mark on the card was Peoria.

They next heard of him in September, 1923, when appellee came to Urbana and asked his wife to sign either a contract by which he could put on the market a medical compound, or sign a note. Appellant refused to sign the paper which he desired. Appellee testifies that he, at that time, expressed a desire to resume the marital relation. Appellant denies that but testifies that what he did say was that if she would sign it would enable him to buy a home for them. That was the last either the mother or daughter ever heard of or from appellee until after the filing of the bill for divorce by appellant.

The chancellor had the witnesses before him and heard all the proofs and entered a decree dismissing both the original bill and the cross bill for want of equity and appellant has appealed. Upon a review the testimony

in this case is not convincing that appellee, in August, 1922, when his wife and daughter moved to Urbana, intended to desert and abandon appellant. Nothing that appellee said or did affirmatively in August, 1922, could be construed as an intention to desert his wife. That appellee did not write to or visit his wife and daughter for a long period of time

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after they had moved to Urbana, can as well be explained upon other theories as upon the intention to desert his family. Desertion, in order to be a valid ground for divorce, must not only be willful and without reasonable cause in the beginning, but must continue so for the period of at least two years. (**Reams v. Reams**, 202 Ill. App. 491; **Lofftus v. Lofftus**, 134 Ill. App. 360.)

"Consent to a separation may be implied from acquiescence or from other circumstances which show the plaintiff's consent or that the separation was not against his or her will. The consent need not be express. It may be tacit, as where the plaintiff was willing and made no objection." 9 R. C. L., page 359, sec. 145. Neither, in the opinion of this court, did the supplemental bill state a ground for divorce, nor can appellant avail herself of the matters set out in the supplemental bill in this action. (**Heffron v. Knickerbocker**, 57 Ill. App. 339; **Brownback v. Keister**, 220 Ill. 544.)

Under the Divorce Act of this State, "the commission of a felony or other infamous crime" is a ground for divorce. Section 614 of chapter 33, Revised Statutes, Illinois, defines felonies and section 615 of the same chapter provides that every other offense than those named in section 614 of the criminal code is a misdemeanor. It has been expressly held that an offense punished by imprisonment in the penitentiary or by fine only is a misdemeanor. (**Lambkin v. People**, 94 Ill. 501; **Herman v. People**, 131 Ill. 594; **Baits v. People**, 123 Ill. 428; **Paulson v. People**, 195 Ill. 507.) Section 616 of chapter 38, Ill. Rev. Stat. defines infamous crimes and we have no doubt but that the legislature of this state in defining "the commission of a felony or other infamous crime as a ground for divorce, had reference to such offenses as fixed and determined by the laws of this state and not to offenses that might be denominated "felonies" in some other jurisdiction.

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Finding no error in the record, the decree of the Circuit Court of Champaign County is affirmed.

Affirmed.

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Gen. No. 7937

Agenda No. 39

October Term, 1925

H. D. Lutz, Appellee,

vs.

Harry Riley, Sheriff, Appellant.

Appeal from Circuit Court of Shelby County.

SHURTLEFF, J.

This is a suit in replevin brought by appellee against appellant, the sheriff of Shelby County, to determine the ownership and right to possession of a certain quantity of broom corn and other corn. There was a trial by jury and a verdict and judgment for appellee, and appellant has appealed.

In March, 1923, appellee leased certain lands from the Chicago & Eastern Illinois railway and employed one John Daelhousen to work upon said lands and upon other lands belonging to appellee. At about the same time also, appellee purchased a broom corn shed from one Spicer, which was located near the tracks of said railway. Daelhousen at the time was indebted to the Farmers State Bank of Findlay, of which appellee was a stockholder and director, in the sum of between twelve and thirteen hundred dollars, and it appears that by an arrangement between Daelhousen and appellee, the larger part of his earnings was applied upon the Farmers State Bank indebtedness. Daelhousen at the same time was indebted to the First National Bank of Findlay upon a note in the sum of four thousand dollars, upon which note the bank, through its cashier, having caused judgment to be entered on the 9th day of June, 1923, in Piatt County, while all of the parties interested in said note were living in Shelby County, on the 8th day of September, 1923, caused

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an execution to be issued thereon and placed in the hands of the Sheriff of Shelby County, who seized the corn raised and harvested upon the lands leased by appellee when the same was ready to ship to market, by virtue of said writ, as the property of the said Daelhousen.

Appellant complains of the rulings of the Court as to the admission and rejection of evidence in certain particulars and as to the giving of certain instructions in behalf of appellee. We have examined the record and read the testimony and we are unable to find any error that would warrant a reversal of this case. The record is bare of any proofs that tend to show that Daelhousen had any interest in said corn or had any connection with appellee other than an employee for hire, and while there may be some errors in the rulings of the court upon evidence and appellee's given third instruction is inaccurately drawn, under the facts in this case, such errors would not warrant this court in reversing the judgment.

The cause was submitted to a jury and in the opinion of this court substantial justice has been done. The judgment of the Circuit Court of Shelby County is therefore affirmed.

Affirmed.

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241 1.A. 638

Term No. 3

Agenda No. 22

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

FILED

FEB 17 1925

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

OCTOBER TERM, A. D. 1925.

J. P. GALLAGHER,
Defendant in Error,

-vs-

BAILEY WILKINSON, Sr., and
BAILEY WILKINSON, Jr.,
Plaintiffs in Error.

Error to the
Pulaski County
Circuit Court

OPINION by BOGGS, P. J.

An attachment proceeding was instituted in the circuit court of Pulaski County by defendant in error, hereinafter called plaintiff, against plaintiffs in error, hereinafter called defendants, to recover for damages to plaintiff's car, sustained in a collision alleged to have been the result of negligence on the part of the defendants. To the declaration filed in said cause, defendants filed a plea of the general issue. The cause came on for trial, and after the jury were sworn and a part of the plaintiff's evidence had been heard, plaintiff, by leave of court, changed the form of action from assumpsit to an action on the case. A special count was filed, in and by which it was charged that "while the plaintiff was in the exercise of due care and caution for his own safety and the safety of his automobile, the defendants then and there care-

lessly, improperly, wrongfully and negligently drove and managed their said automobile at a great rate of speed, to wit, 50 miles per hour, along and upon said public highway aforesaid, and then and there ran their said automobile with great force and violence into, upon and against the automobile so driven by the plaintiff, by means whereof plaintiff's automobile was then and there injured, broken and destroyed," alleging damages, etc.

A verdict was returned for plaintiff in the sum of \$150.00. A motion was made by the defendants for a new trial, which motion was overruled, and judgment was rendered on the verdict. To reverse said judgment, this writ of error is prosecuted.

It is first contended by defendants that the court erred in refusing to exclude the evidence and direct a verdict in their favor, on motions made by them to that effect at the close of plaintiff's evidence, and again at the close of all the evidence.

We are of the opinion and hold that the court did not err in denying said motions, as the evidence of the plaintiff, taken as true, with all reasonable inferences to be drawn therefrom, fairly tended to prove his case, as set forth in the amended or special count of his declaration. This being true, the court did not err in denying said motions. MacGregor v. Reid-Murdock & Co., 173 Ill. 464; Libby, McNeill & Libby v. Cook, 228 Ill. 208.

It is next contended by defendants that the verdict is against the manifest weight of the evidence.

The record discloses that the plaintiff was in an Oldsmobile sedan, driving north on the state road between Villa Ridge and the village of Pulaski, accompanied by one John Roach, to whose home and farm they were going. Roach lived about two and a half miles southwest of Pulaski. The road leading past Roach's farm runs easterly and westerly across said concrete state road. There is a cross road sign about eighty rods south of the point where the concrete road and said cross road inter-

sect, reading "Look. Curve Right. Cross Road."

Plaintiff testified with reference to said occurrence: "I stepped on brake and slowed car down, stuck out my hand, reached back and caught the wheel so as to make the turn. Just before the front end of the car left the pavement heard the sound of horn, and the crash came immediately. Just an instant after the honking of the horn, I was struck. Grabbed the wheel to make turn, but it was too late. The car Wilkinson was driving carried my car 30 feet. Had stop light on my car in rear. It was in good condition at time of accident. I slowed down about 100 feet from the crossing, put my foot on brake that flashes stop light on rear. It was red light and used the word 'Stop.'" Beach testified: "I told Gallagher, 'This is where we turn off.' Jack (Gallagher) threw out his hand; left hand. Put his foot on brake. Just then heard the sound of horn." Other witnesses testified on behalf of plaintiff with reference to damages to plaintiff's car, tracks on pavement, etc., as they existed after the accident.

On the other hand, the defendants testified to the effect that they first saw plaintiff's car when it was about half a mile ahead of them; that they came up to within about 200 feet of plaintiff's car and drove behind him for some while, keeping about that distance; that the pavement was damp and slippery; that they did not see any stop light and did not see any signal given by plaintiff, indicating that he was going to turn off of the pavement on to this cross road: that plaintiff was driving about 25 miles per hour; that at the time they started to go around plaintiff's car they were driving about 30 miles per hour; that they did not observe that plaintiff was intending to turn off of the state road on to the cross road until the front of their car was about even with the rear of plaintiff's car, when plaintiff suddenly turned his car to the left, and that the collision immediately followed.

The evidence was therefore conflicting, and it was a question of fact for the jury as to whether or not plaintiff,

just prior to and at the time of the accident, was in the exercise of due care for the safety of himself and his automobile, and as to whether the defendants were guilty of negligence proximately contributing to the accident in question, as charged in the declaration. Johnson v. Coey, 237 Ill. 38; Sullivan v. Ohlhaber, 301 Ill. 359-362; Pietro v. Hines, 292 Ill. 236-240. On those issues the jury found for the plaintiff, and we are not disposed to disturb their finding, as we hold that the verdict is not against the manifest weight of the evidence.

It is also contended by defendants that the court erred in overruling a motion made by them for a continuance, following the change of the form of action from assumpsit to case. This motion is not abstracted. We have, however, examined the record, and we find that while a motion was made, no affidavit was presented or other showing made to the effect that defendants were surprised, or were not in a position to proceed with the trial of said cause. To begin with, defendants are not in a position to urge this assignment of error, and if they were, there is no sufficient showing to the effect that the court erred in overruling said motion.

It is also contended by the defendants that the defendant Bailey Wilkinson, Sr., was the guest of Bailey Wilkinson, Jr., and that the court erred in not dismissing the proceedings, or granting a new trial as to him. There is no assignment of error raising this question; neither did the motion for a new trial bring this matter to the attention of the trial court. The defendants are therefore not in a position to urge this contention in this court.

No complaint is made as to the ruling of the court on the instructions, and there is no contention that the verdict is excessive.

Counsel for defendants spend a large part of their argument on the question of the sufficiency of the declaration. A demurrer was filed by the defendants to the declaration; the

demurrer was overruled and the cause was tried on the declaration and the plea of the general issue. The only question then that could be urged against the declaration after verdict, is that it is so insufficient that it will not sustain a judgment. An examination of the declaration will disclose that it is in the usual form of declaration in cases of this character, and the court did not err in holding the same sufficient.

It is also contended that the proof should have shown that the accident occurred in Pulaski County. No authority was cited to support this contention, and none can be found, as it is not the law that in cases of this character the suit must be brought in the county where the injury occurred.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be Reported

1997

In The
APPELLATE COURT OF ILLINOIS, **241 I.A. 638**
Fourth District.

OCTOBER TERM, A. D. 1925.

THE PEOPLE OF THE STATE OF ILLINOIS,)	
Defendant in Error,	(	Error to the
-vs-)	
	(	Perry County
SYLVESTER RIZZUTTI,)	
Plaintiff in Error.	(	County Court

OPINION by BOGGS, P. J.

At the September term, 1924, of the county court of Perry County, an information was filed against plaintiff in error, consisting of two counts, each count charging the unlawful sale of intoxicating liquor. The first count of the information was nollied by the state's attorney. The motion made to quash the second count of the information was overruled, a plea of not guilty was entered, and a trial was had, resulting in a verdict of guilty. Plaintiff in error was sentenced to pay a fine of \$1,000.00, and ordered to stand committed to the Illinois State Farm at Vandalia for a term of ninety days and thereafter until said fine and costs were paid.

It is first contended by plaintiff in error for a reversal of said judgment that the evidence wholly fails to support the verdict and judgment. Two witnesses testified on behalf of the People, to the effect that they had been employed by the

state's attorney of said county to investigate liquor cases: that on the 28th day of June, 1924, they purchased of plaintiff in error two drinks of whiskey, which they drank in plaintiff in error's place of business, and also purchased a half-pint of whiskey which they carried away with them. They further testified that plaintiff in error's place of business purported to be a soft-drink parlor and a pool-room; that it had fixtures similar to a saloon, and that the sale of said liquor was made to them by plaintiff in error himself.

Plaintiff in error testified in his own behalf to the effect that the witnesses who testified on behalf of the People came into his place of business and "asked him to sell them a drink, and that he told them he never sold that, and told them to get out, and never saw them any more." Plaintiff in error's son and five other witnesses testified on behalf of plaintiff in error, to the effect that they were in his place of business at the time the two witnesses for the State came in; that they saw the two witnesses talk with plaintiff in error and then leave his place of business; that plaintiff in error never sold anything to either of said witnesses while these respective witnesses were present. Certain of said witnesses testified to the effect that they saw the witnesses for the State talking to plaintiff in error, and heard him say he didn't "run that kind of business," or "no, I am not in that kind of business."

The jury heard the testimony of all of these witnesses, and it was for them to say what credit should be given to their testimony. While a greater number of witnesses testified on behalf of the plaintiff in error than testified on behalf of the People, still it does not follow from that fact alone that the jury were not warranted in finding plaintiff in error guilty. We are of the opinion and hold that the jury were warranted in returning a verdict finding plaintiff in error guilty as charged.

It is next contended that the second count of said information did not state an offense under the Illinois Prohibition

statute. The charging part of said information is as follows: "did then and there unlawfully sell intoxicating liquor, said act in making said sale of intoxicating liquor being then and there prohibited, unlawful and in violation of the Illinois Prohibition Act: said liquor being for beverage purposes and fit for beverage uses and not wine for sacramental purpose and not denatured alcohol or denatured rum used as provided by law nor vinegar or preserved sweet cider, and said liquor so sold as aforesaid not then and there having been sold on a prescription of a physician," contrary to the statute, etc.

The contention of counsel for plaintiff in error is, that the information does not negative the sale under a permit, and that it does not negative the exceptions so as to show affirmatively that the crime defined had been committed. The permit of the attorney general is not necessary when the liquors are sold for beverage purposes; in other words, the statute does not authorize the attorney general to issue a permit for the sale of intoxicating liquors for beverage purposes. The information charges the sale of liquor for beverage purposes without a prescription of a physician. We are of the opinion and hold that the information was sufficient, under the holding of the supreme court in *People v. Barnes*, 314 Ill. 140, and *People v. Martin*, 314 Ill. 140.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported

FILED

FEB 17 1925

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 10

Agenda No. 2

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

OCTOBER TERM, A.D. 1925.

241 I.A. 638

THE PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,)
-vs-)
OWEN KIBLER,)
Plaintiff in Error.)

Error to the
Jasper County
County Court.

OPINION by BOGGS, P. J.

An indictment was returned by the October, 1924, Grand Jury of the Circuit Court of Jasper County against plaintiff in error, charging him with carrying upon his person a concealed weapon, in violation of section 4, chapter 38, paragraph 137 of Cahill's Revised Statutes. The indictment was certified to the County Court, where a trial was had, resulting in a verdict of guilty. Judgment was rendered thereon, and a fine of \$100.00 and costs was imposed. To reverse said judgment, this writ of error is prosecuted.

While several grounds are relied on for a reversal of said judgment, it will only be necessary for us to consider one of them. It was charged in the indictment that the offense was committed in Jasper County. This was a material averment, and unless proven by the evidence introduced on the trial, the judgment must be reversed. Rice v. People, 38 Ill. 435; Jackson v.

People, 40 Ill. 405; Sattler v. People, 52 Ill. 63; Daugherty v. People, 118 Ill. 163; Moore v. People, 150 Ill. 405; People v. Ogarry, 271 Ill. 138.

Several witnesses testified on behalf of the People. However, not one of said witnesses testified to having seen plaintiff in error carrying a pistol or revolver on his person in Jasper County, or even in the State of Illinois. Certain young ladies, witnesses on behalf of the People, testified to having gone riding with plaintiff in error in an automobile, and to the effect that he had a revolver or pistol with him, which he placed in the end of the seat of the automobile. Three of said witnesses testified to the effect that they had either seen him take a revolver from his hip pocket or put a revolver in his hip pocket, at one time or another, but not one of said witnesses testified with reference to what county the particular transaction occurred in. The evidence disclosed that the automobile riding had taken place in Jasper County and in Cumberland County, and one or more of these young ladies had visited with plaintiff in error in the vicinity of Mattoon, in Coles County.

Venue may be proved by the facts and circumstances surrounding the transaction. People v. McIntosh, 242 Ill. 603; Langdon v. People, 133 Ill. 382; Wineburg v. People, 203 Ill. 15. And such proof need not be beyond a reasonable doubt, as it is not an element of the crime. People v. McIntosh, supra. Nevertheless, the proof must be made. In Moore v. People, supra, the court at page 407 says:

"It was proven on the trial that the crime was committed in Upper Alton, and this was the only evidence introduced to prove the venue. In Sullivan v. The People, 114 Ill. 26, where the indictment charged that the offense was committed in Peoria county, and the evidence showed that the crime was committed on Washington street, in Peoria, Illinois, we held that the venue was proven. But that case can not control here. Had the proof shown that the

crime was committed in Upper Alton, Illinois, the case cited would be in point; but there was no evidence introduced to show in what State the offense was committed, or in what county or State Upper Alton is located, and in the absence of proof that Upper Alton was in the State of Illinois or in Madison County, the venue was not established by the evidence. For aught that appears there may be an Upper Alton in Iowa or Indiana, or some other State, and where the evidence merely shows that a crime was committed in Upper Alton, the jury have no means of knowing whether it was committed in this State or some other State."

This case is quite applicable to the facts in the case at bar, as the witness Cella Shackman testified on behalf of the People that she saw plaintiff in error with a gun "in a holster strapped on him, in Crooked Creek Township," but there is nothing to show that Crooked Creek Township is in Jasper County, or even in the State of Illinois. We therefore hold that the evidence wholly fails to prove that the offense charged was committed in Jasper County. The judgment is therefore reversed and the cause is remanded.

Reversed and remanded.

Not to be reported

FILED

FEB 17 1925

Robert S. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 18

Appeals

3

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

241 I.A. 638

OCTOBER TERM, A. D. 1925.

THE McCASKEY REGISTER COMPANY,)	
Appellant,	(	Appeal from the
)	
-v-	(	City Court of
)	
WILLIAM J. CLAYTON,	(	East St. Louis.
Appellee.)	

OPINION by BOGGS, P. J.

Appellant, a corporation of Alliance, Ohio, engaged in the manufacture of machines and appliances for keeping a credit system, brought suit in a justice court of St. Clair County against appellee, a groceryman of East St. Louis, to recover for a register system alleged to have been sold to appellee by appellant. A trial was had, resulting in a finding and judgment in favor of appellant. On appeal to the city court of East St. Louis, a trial was had, resulting in a verdict and judgment against appellant, in bar of action and for costs. To reverse said judgment, this appeal is prosecuted. No brief having been filed on behalf of appellee, under our rules we could reverse the case pro forma; however, we have deemed best to consider the case on the merits.

The record disclosed that one T. C. Jordan, a sales agent of appellant, procured an order from appellee for a register system, for which appellee was to pay \$105.00; \$15.00 was to be

paid in cash, for which a check was given, and the balance was to be paid in twelve monthly installments of "15.00 each. On the back of the order and as a part of the same, was the following provision: "This order given subject to acceptance by the McCaskey Register Company at Alliance, Ohio. If not accepted, any money paid hereon shall be refunded. Acceptance of this order, by starting work thereon, or by mailing an acceptance to the customer, shall make a binding contract. This order shall not be subject to cancellation after acceptance."

The next day, that is, on October 8th, appellee stopped payment on said check. He also called Jordan's home and was informed that Jordan was out of the city. Mr. Jordan called on appellee on his return. Appellee testified: "I told him I cancelled the order, I did not want it, and he asked me to accept it and keep it and he would dispose of it, and I told him I did not want it and he said the order was in already, he done sent the order in, and he said it would take from ten to twenty days before I got it, and I told him I would not take it. I stopped payment on the check the next morning after it was made." Appellee also testified that he had this conversation with Jordan not more than four days after the order was given. He further testified that he never received any notice of acceptance of his order from appellant.

On the other hand, Jordan testified that the conversation with appellee took place some two weeks after the order had been given, and that he informed appellee that he had no authority to do anything with reference to a cancellation of the order. He further testified that he stated to appellee, "all that I can do for you now that you have bought this, is to dispose of it for you." He further testified that appellee refused to receive the system. E. G. Ball testified on behalf of appellant that he was the manager of the order department of appellant company, and that he mailed an acceptance to appellee on October 9th; that he placed the order with the operating department, and that no cancellation

or request for cancellation of said order had been received from appellee. L. L. Maxwell testified on behalf of appellant that he was the shipping clerk for appellant company, and that he delivered one register system to the Pennsylvania Railroad Company in filling said order.

It is contended by appellant for a reversal of said judgment that W. C. Jordan, while a sales agent for appellant, had no authority to receive notice of a cancellation of the order from appellee. It is practically conceded by counsel for appellant that inasmuch as the order taken provided that it must be accepted by appellant company, either by written acceptance or by starting work on the system in filling the order, that if notice of cancellation was given by appellee prior to a written notice of acceptance or prior to the commencement of work on said system in filling the order, that appellee would have the right to cancel the same, and this is undoubtedly the law. No provision was made in the written order with reference to a cancellation of the order by appellee.

It being the law that appellee had the right to cancel the order before its acceptance, we are of the opinion and hold that notice to the sales agent who took the order, of the desire to cancel the same, would be notice to appellant company. The jury had the right to take into consideration, in determining whether notice of cancellation was given, the fact that appellee on the day following the giving of the order, stopped payment on the check given for the cash payment, and they would also have the right to presume that appellant in due course received notice from said bank that payment had been stopped on said check. In other words, we are of the opinion and hold that the jury were warranted in finding that appellee had given notice to appellant of the cancellation of said order, and that such notice was given prior to its acceptance on the part of appellant. Appellee testified that he never received any notice from the company of the acceptance of his order, and while one witness for appellant tes-

tified that he sent the notice, it was a question for the jury as to whether or not appellee received the same. The record also fails to show that any work was done by appellant on the system for appellee. While there is evidence in the record to the effect that the system was shipped, so far as the record shows, it was one that was already on hands, and not one upon which any special work was necessary. The contract provides that the beginning of work on the system or the giving of written notice of acceptance shall constitute an acceptance.

Appellant also assigns error on the ruling of the court on the instructions. Counsel for appellant say that the instructions given on behalf of appellee are abstract in form and not applicable to the facts in the case. An examination of the instructions discloses that this contention is not well taken, for each and all of the instructions given on behalf of appellee purport to be applicable to the facts in this case, and are not abstract in form.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be Reported

FILED

FEB 17 1925

Robert P. Boggs
CLERK OF THE DISTRICT COURT
FOURTH DISTRICT OF ILLINOIS

Agenda No. 13

Term No. 30

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

241 I.A. 639

OCTOBER TERM, A.D. 1925:

JESSIE ADAMS,)	
Appellant,	(	Appeal from the
)	
-vs-	(	Marion County
)	
CITY OF CENTRALIA,	(	Circuit Court
Appellee.)	

OPINION by BOGGS, P. J.

Appellant brought suit in the circuit court of Marion County against appellee, the city of Centralia, to recover for personal injuries alleged to have been sustained by her by reason of falling through a stone sidewalk on North Poplar street in said city.

On the morning of December 10th, 1923, appellant alighted from her husband's automobile at the corner of Poplar and McCord streets in said city, and while walking in a southerly direction on the east side of Poplar street, one of the stone slabs comprising a part of the walk gave way under her weight, and a triangular piece of stone from the center of the walk fell into a depression beneath the walk. Appellant's limb protruded through the break in the walk and she received the injury for which this suit is brought.

The declaration consisted of two counts, and in apt

terms set forth the ownership and control of the sidewalk in question by appellee; that by reason of certain excavations made under the same, said sidewalk became unsafe to pedestrians traveling upon the same; that the said city negligently failed to exercise reasonable care and diligence to keep the sidewalk in a reasonably safe condition; that a slab of said sidewalk broke off when appellant was passing over the same, by reason of which she was unavoidably caused to fall and to injure her limb; that notice ~~was~~ given to said city as provided by statute. A plea of the general issue was filed to said declaration, and a trial was had. At the close of appellant's evidence, a motion was made by appellee to exclude the evidence and to direct a verdict in its favor, which motion was denied. Again, at the close of all the evidence, appellee entered a motion to exclude the evidence of appellant and to direct a verdict in favor of appellee, which motion was allowed, and a verdict was directed, finding appellee not guilty. Judgment was rendered on said verdict against appellant, in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

The only question raised and preserved for review on a motion to direct a verdict in this character of case is: Does the evidence on the part of appellant, taken as true, and most favorably considered for her, with all reasonable inferences to be drawn therefrom, make out a prima facie case on the part of appellant? The question of the weight of the evidence or the credibility of the witnesses cannot be considered. *Kelly v. Chicago C. Ry. Co.*, 283 Ill. 640-642. Or, otherwise stated, if there was any evidence in the record from which, standing along, the jury might without acting unreasonably in the eyes of the law, have found the material averments of the declaration to have been sustained, the motion to direct a verdict should have been denied. *MacGregor v. Reid, Murdock & Co.*, 173 Ill. 464; *Libby, McNeil & Libby v. Cook*, 222 Ill. 206; *Devine v. Delano*, 272 Ill. 166; *Kelly v. Chicago C. Ry. Co.*, *supra*, 642.

Appellant testified with reference to how she received her injury, but not as to the condition of the sidewalk prior to the time she was injured.

Denver Adams, the husband of appellant, testified: "I heard my wife holler, and looked around: she was down on the sidewalk, about forty feet from me. On the sidewalk next to Pfeffer's garage, on the east side of Poplar street. I ran to the scene and took hold of her. There was a hole there that was two or three feet wide and four feet long and three and one-half feet deep. The walk was on top of an excavation. From the top of the sidewalk the excavation was three and one-half feet deep. It was three and one-half feet wide; that would be north and south and three and one-half feet east and west. The walk was of the width of four feet. It was a busy street. My wife's limb was in the hole. The walk caved in there; from the center there was a piece had broken plumb through on the east side and on about a 45-degree angle laying in the hole. Her limb was protruding through the center of the broken part, practically in the center in the broken parts of the walk. The limb was through the walk up to the knee and she was laying over on her knee that was out."

"I had occasion to be along that street before the injury occurred; there was a pile of dirt along the sidewalk for three months or more. I observed that there was an excavation under the walk. I seen men working there. They throwed the dirt out there and the dirt had been piled up there for three months before the injury."

Certain other witnesses testified on behalf of appellant, with reference to her injuries, etc., but not as to the accident or the condition of said sidewalk.

It is insisted by counsel for appellee, that even though the sidewalk was in a defective condition, the evidence fails to show notice to the city of such condition, either actual or constructive.

It is not contended by appellant that actual notice has

been shown, but it is contended, on the evidence submitted by her, taken as true with the inferences reasonably to be drawn therefrom, that the conditions surrounding the sidewalk, which had obtained for some three months prior to the accident, were sufficient to show constructive notice to appellee of the condition of said sidewalk; that such excavations had been done in such an obvious manner, on a much-used street, that the city must be presumed to have had notice of what was going on.

Generally, it is a question of fact for the jury as to whether a city has had notice of a defect in its streets, and it is only where the facts are undisputed and but one reasonable inference can be drawn from them that it becomes a question of law for the court. *City of Chicago v. Murphy*, 84 Ill. 224; *Boender v. City of Harvey*, 251 Ill. 223-231.

Under the law as above stated, we are not to weigh the evidence, but are only to determine as to whether or not the evidence on the part of appellant, taken as true, with all reasonable inferences to be drawn therefrom, fairly tends to prove the allegations of her declaration. Without going into a further discussion of the evidence, we are of the opinion and hold that, so viewed, the evidence does fairly tend to prove the allegations of appellant's declaration, and the court therefore erred in directing a verdict in favor of appellee.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported

1925

Term No. 34

Agenda No. 25

In The

APPELLATE COURT OF ILLINOIS,
Fourth District.

OCTOBER TERM, A.D. 1925:

241 I.A. 639

WILLIAM M. BERRY,)	
Appellee,	(	Appeal from the
)	
-vs-	(	City Court of
)	
J. J. NEVENER,	(	East St. Louis.
Appellant.)	

OPINION by BOGGS, P. J.

Appellee recovered a judgment for \$1,000.00 in the city court of East St. Louis in an action on the case against appellant for an injury alleged to have been sustained by appellee through the negligence of appellant.

It is first contended by appellant for a reversal of said judgment that appellee was not in the exercise of due care and caution for his own safety just prior to and at the time of the accident.

Broadway in the city of East St. Louis connects with St. Louis, Missouri, over the Eads Bridge, and runs in an easterly and westerly direction. On the East St. Louis side, Broadway connects with a street known as Third street. There is a double street-car track on Broadway.

On the day in question, appellee was walking along the south side of Broadway in East St. Louis, and when about 125 feet

from its intersection with Third street, he attempted to cross from the north to the south side. In this connection appellee testified: "I looked back to the left or west to see if there was anything coming, before I started. I saw nothing. There were no automobiles coming in either direction. I got about to the westbound tracks before I noticed an automobile. At that time I was about halfway down the decline, or one hundred or one hundred ten feet of the east end of the viaduct. I heard the rattle of a machine coming from the west; no horn was blown. It was coming fast, and I could not make it to the north sidewalk, I swung to get out of the way and the fender and front wheel got me. The machine did not pass over me--it knocked me to the east and south. The machine continued off the viaduct and turned up Third street. It passed between me and the north curb. It was just over the westbound track, but was going east. There were twenty or twenty-five feet between the south curb and the place where I was struck."

William Thomas, a colored man, testified on behalf of appellee: "I was on Broadway, looking west, and I saw the plaintiff coming down the viaduct, and I looked up again and I saw a car coming down the viaduct; the plaintiff goes to an offset in the viaduct and crosses the street, and he looks behind and there is a car coming, and when he comes down the street this car is chasing him and he starts to go back this way, and before he could get back the car hit him--that is all. The automobile was on the north side of the street, just before it hit the man. The automobile passed between the man and the north curb. The viaduct was clear at that time. I don't know how fast the machine was running, never owned one and never had my hand on one, but I presume it was going thirty-five miles an hour."

On the other hand, appellant testified: "I was driving on the south side of the viaduct with the right front wheel of my Ford between the rails of the south track. My right wheels were about four or four and a half feet from the south curb or sidewalk.

I saw Berry before the accident when I was coming down the incline. I had passed the middle or high point of the viaduct. I guess I was about fifty or sixty feet from him when I saw him. When I first saw him he was on the south sidewalk, stepping down into the street. I was on the south side of the viaduct, going about fifteen miles an hour. When he stepped from the curb he stopped between the rails of the south car tracks and looked in a westerly direction. That was the direction from which I was coming; he looked towards me. 'Believing he had seen me, I swerved slightly to the left and continued on down the viaduct.' He stopped there after stepping off of the sidewalk. I got over out of the car tracks into the center of the street. 'Assuming he had seen me and would wait until I passed, I went on, and when I was within ten feet of him he started to dash across the street, not directly, but more diagonally, as if to cross over ahead of me, and when I saw it would be impossible for him to do that without serious trouble, I again swerved over to the left to avoid hitting him and as he kept on coming he came in contact with the machine.' I had swerved to the left when he started across, to avoid hitting him, and I applied the brakes, and after he came in contact with the Ford I ran possibly twenty-five or thirty feet before I stopped. I did not sound my horn because I assumed he saw me, as he was looking at me."

One George Ripley testified on behalf of appellant that the witness Thomas had told him that appellee ran in front of the automobile in question and got hurt, and asked him to see appellant, "and if Weaver would pay him something, he would testify for him."

The evidence being sharply conflicting, it was a question for the jury as to whether appellee, just prior to and at the time of the accident in question, was guilty of negligence which contributed to his injury. If the jury believed the testimony of appellee's witnesses, they were clearly warranted in finding that appellee was not guilty of contributory negligence. We would

therefore not be warranted in disturbing the verdict on that ground. Johnson v. Coev, 237 Ill. 88; Sullivan v. Ohlhaber, 291 Ill. 359-362; Pietro v. Hines, 299 Ill. 236-240.

It is next insisted by appellant that counsel for appellee was guilty of conduct on the trial of said cause, requiring a reversal of said judgment. Appellee was asked on direct examination:

"Q. What, if any, money did you pay for your room at the hospital, Mr. Berry?

"A. The insurance company paid that.

"Mr. Klingel: I object to that and move that it be stricken.

"The Court: I don't know what the declaration avers.

"Mr. Klingel: I object to that last answer and move that it be stricken.

"The Court: Read the last question and answer.

"Q. (as read) What, if any, money did you pay for your room at the hospital, Mr. Berry?

"A. The insurance company paid that.

"The Court: The jury will disregard that answer, and the objection will be sustained.

"Q. Did you pay any money for doctor bills?

"A. No, sir.

"Q. You didn't pay that?

"A. No."

The courts have frequently held it to be reversible error for counsel representing the plaintiff in a personal injury suit, to bring it to the attention of the jury that the lawsuit is being defended by an insurance company. Eckhart & Swan Milling Co. v. Shaver, 101 App. 500; Fuller Co. v. Darragh, 101 App. 665; Wiersema v. Lockwood & Strickland Co., 147 App. 32.

An examination of the cases cited by appellant will disclose that in those cases something was done by counsel representing the plaintiff to bring to the attention of the jury the fact

that the case they were to try was being defended by an insurance company. We do not think that the questions propounded in this case can fairly be held to come within that rule, as there is nothing to show that the insurance company who may have paid for appellee's room at the hospital was defending this lawsuit. And as the court immediately struck the answer, and instructed the jury to disregard it, we hold that no reversible error resulted therefrom.

It is next contended by appellant that the court erred in its rulings on the evidence. Among other questions propounded to appellee as to alleged losses he had sustained by reason of his injury, he was asked:

"Q. What did you say the loss to your business was?

Objected to by appellant. Objection overruled.

"Q. Did you lose any income on account of this sickness?

"A. Well, I have to earn my living--I have no help from anyone--it possibly ran from two hundred to three hundred a month."

Objection was made to the answer "unless he further states what his income was--if he had a business during that time, that is easily told."

"The Court: You may bring that out on cross examination."

At the close of the direct testimony of appellee, counsel for appellant moved to strike the testimony of appellee with reference to his earnings, on the ground that it was purely speculative, but the court overruled the motion.

The answer to the question as to what appellee's possible earnings were, should have been stricken, even though the question was not objected to. The objections made by appellant to this and other questions propounded to appellee and his answers thereto, clearly disclosed that appellant was insisting that appellee should state as nearly as possible what his earnings were in the business in which he was engaged, prior to the time of his injury. The court erred in its ruling in this respect. There is nothing in the record to substantiate the answer of appellee to the effect

that his income was from \$200 to \$300 per month.

It is next contended by appellant that the court erred in the giving of appellee's first given instruction. We have examined this instruction, and hold that, while not as carefully guarded as it should have been, it states a correct principle of law and there was no reversible error in the giving of the same.

It is next contended by appellant that the verdict is excessive. Appellee lost, according to his own testimony, some twelve to fourteen weeks time on account of his injury. By reason of the failure of appellee to make proof by competent evidence of any loss he may have sustained to his business on account of said injury, and by reason of the fact that his doctor and hospital bills have been paid, we hold that unless a remittitur of \$500.00 be entered, the judgment should be reversed.

It is therefore ordered by the court, that if appellee enter a remittitur of \$500.00 within twenty days after the filing of this opinion, the judgment shall be affirmed. Otherwise, it will be reversed and the cause will be remanded.

Not to be reported

3 46
Term No. 36

Agenda No. 7

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

EB 17 1925

OCTOBER TERM, A. D. 1925.

BELLE PICKERING, Administratrix
of the Estate of CHARLES E.
PICKERING, Deceased,
Plaintiff in Error,

-vs-

W. W. WHEELOCK and WILLIAM G.
BIERD, Receivers, CHICAGO &
ALTON RAILROAD COMPANY,
Defendants in Error.

241 I.A. 639

Error to the
Madison County
Circuit Court.

OPINION by BOGGS, P. J.

This is a writ of error prosecuted by plaintiff in error, hereinafter called plaintiff, to reverse a judgment rendered against her as administratrix of the estate of her deceased husband, in a suit brought in the circuit court of Madison County against defendants in error, hereinafter called defendants, as receivers, etc., to recover for the death of her said husband, which occurred in a crossing accident in the city of Alton.

The declaration consists of four counts. The first count charges negligence generally; the second count charges a failure to give the statutory crossing signals; the third charges a violation of the ordinances of the city of Alton with reference to the speed of trains; and the fourth charges a violation of the ordinances of said city with reference to the ringing of a bell.

To said declaration a plea of the general issue was filed. A trial was had, resulting in a verdict and judgment against the plaintiff, as above set forth.

The record discloses that about 5:30 on the morning of December 28th, 1923, plaintiff's intestate left his home in a Ford automobile, accompanied by one of his neighbors, for the purpose of going to the plant of the Laclede Steel Company, where the deceased was employed.

Broadway in said city is a paved street running east and west, and Cut street runs from Broadway in a southerly direction to the Illinois Steel Company and various other factories. At the southwest corner of the intersection of Broadway and Cut street is located a building known as the car sheds. The Big Four tracks and the Chicago & Alton tracks cross Cut street at right angles. The main track of the Big Four railroad is located about forty feet south of said building, and the Chicago & Alton main track is located about fifty feet south of the Big Four tracks; in other words, the record discloses that the Chicago & Alton track on which the train in question was being operated, was 92 feet south of said building. There is also a spur track between the tracks of the Big Four and the Chicago & Alton, used by the Pierce Oil Company for the unloading of oil tank cars, and on the morning in question there was an oil tank car standing on this spur about ten feet from Cut street. The record discloses that, just prior to the accident in question, plaintiff's intestate, with his companion, was proceeding in a southerly direction along Cut street toward the Chicago & Alton tracks, at a speed of some seven to ten miles per hour. As he neared the Chicago & Alton tracks, the speed of his car was reduced to from two and one-half to some four or five miles per hour. So far as the record discloses, plaintiff's intestate drove on the Chicago & Alton track in front of a passenger train approaching from the west, without ever having looked either way of the track for an

approaching train. The rear end of his automobile was struck and he and the other occupant of said car were killed.

It is first contended by counsel for the plaintiff for a reversal of said judgment that the verdict is against the manifest weight of the evidence. That the train was being operated at a speed in excess of that fixed by the ordinances of the city of Alton, is conceded, but it is insisted on the part of counsel for the defendants that, notwithstanding the speed of said train, plaintiff's intestate was guilty of negligence which contributed to the accident which resulted in his death, and that therefore they, as such receivers, are not liable.

On the issue as to whether a bell was rung and whistle sounded on said engine as it approached said crossing, the great preponderance of the evidence is to the effect that they were. Three witnesses on behalf of the plaintiff testified that they were in the neighborhood of said crossing, and that they did not hear the whistle sounded. Two other witnesses on behalf of plaintiff testified that they were in the neighborhood of said crossing at the time of said accident, and that they heard a whistle blow, but did not know as to what road it was on. On the other hand, the engineer, the fireman, the baggageman and the porter on said train, all testified that the whistle was blown repeatedly as said train approached the crossing. Six other witnesses, not connected with the Chicago & Alton railroad, testified on behalf of defendants that they were in the vicinity of said crossing at the time of said accident, and that they heard the whistle sounded as the train approached said crossing. The evidence is also to the effect that the bell was ringing continuously on said engine as it passed through said city toward said crossing. So far as that issue is concerned, the evidence fully supports the verdict of the jury.

The principal question on the evidence is as to whether plaintiff's intestate was in the exercise of due care for his own

safety, just prior to and at the time of the accident. The record discloses that, but for said oil tank car, which would partially obstruct the view of anyone proceeding south on Cut street, after passing the building at the southwest corner of Cut street and Broadway, the view west on the Alton track was unobstructed for half a mile. The record also discloses that it was before daylight, and the headlight on the engine was burning.

While the law, as contended by counsel for plaintiff, is that one approaching a railroad crossing has the right to assume that the railroad company will operate its trains in compliance with the ordinances of the village through which it is running, still the law further is, that notwithstanding that duty on the part of the railroad, it is still the duty of a person approaching a railroad crossing to use ordinary care for his own safety, in view of all the circumstances surrounding him. *Chicago C. Ry. Co. v. O'Donnell*, 208 Ill. 267; *Fowler v. Chicago & C. I. R. R. Co.*, 234 Ill. 619; *Vastardes v. Chicago & A. Ry. Co.*, 210 App. 546; *Carlin v. Grand T. Ry. Co.*, 243 Ill. 64.

In *Carlin v. Grand Trunk Ry. Co.*, *supra*, the court at page 67 says:

"All reasonable persons know that a railroad crossing is a place of danger. The use of gates or other means of warning to the public reduces the danger, but a person about to cross the tracks is bound to know that the danger exists and to approach the tracks with care proportionate to the danger. He may rely upon the giving of the customary signals, but he must exercise due care himself."

Counsel for the plaintiff seek to rely on the presumption which the law indulges, to the effect that a sober, careful person will, under ordinary circumstances, exercise care for his or her safety. That rule, however, only applies where there are no eye-witnesses to the accident. In this case the record discloses that there were eye-witnesses, so that rule would not apply. *Geisert v. Morris*, 160 App. 72; *Anderson v. Metropolitan W. S. F. Ry. Co.*,

It is also contended by counsel for plaintiff that the fact that plaintiff's intestate was driving slowly as he approached said crossing is evidence tending to show that he was exercising due care. That would be true if there were any evidence tending to show that he gave any attention to whether or not a train was approaching. Plaintiff's intestate was fully cognizant of the conditions surrounding this crossing, as the evidence disclosed that he had crossed there daily for many years prior to the accident, in going to and from his work. We are therefore of the opinion and hold, in view of the evidence in this record, that the jury were warranted in finding that plaintiff's intestate was not in the exercise of due care and caution for his own safety, just prior to and at the time of the accident. *Carlin v. Grand T. Ry. Co.*, supra, page 67.

It is next contended by counsel for the plaintiff that the court erred in its rulings on the evidence. We have examined the record in connection with this assignment of error, and hold that there was no serious error in the ruling of the court on the evidence.

It is next contended by counsel for the plaintiff that the court erred in its rulings on the instructions. No instructions were offered by plaintiff. Of eight instructions given on behalf of the defendants, objection is made to all of them excepting the sixth.

As to instructions one and two, it is contended that it was error to give the same without giving an instruction defining what was due care and caution, or ordinary care. While we approve of the practice of giving such instruction in this character of case, at the same time we do not believe it reversible error not to do so. At any rate, no case so holding has been cited.

The third instruction is as follows:

"You are instructed, that if you believe from the evidence

that plaintiff's intestate, by using his faculties, with ordinary and reasonable care in listening or looking out for the approaching train, could have avoided the collision on the occasion in question, and, if you further believe that he failed to so look or listen and that such failure on his part was negligence and that such negligence contributed or caused the collision and resulting death, then the Court instructs you the plaintiff cannot recover any damages in this case and you should find the defendants, Receivers of Chicago & Alton Railroad Company, not guilty."

The objection to this instruction is that the court should have used the word "would" instead of "could" in said instruction. We are of the opinion that the word "would" is the more appropriate word, but hold that the giving of the instruction in the form given is not reversible error. *Chicago C. Ry. Co. v. O'Donnell*, 203 Ill. 267-277; *Flynn v. City Ry. Co.*, 250 Ill. 460-480; *Gruenendahl v. Consolidated Coal Co.*, 108 App. 644.

The fourth instruction in effect tells the jury that it is their duty to try the case precisely the same as though the suit were between two individuals. This instruction was proper, and the court did not err in giving the same.

The fifth instruction informed the jury that they should take into consideration the number of witnesses testifying with reference to any state of facts, along with all the other evidence, facts and circumstances in the case. Instructions of this character have frequently been approved, and the court did not err in giving the same. *Gage v. Eddy*, 179 Ill. 492-503; *West Chicago C. Ry. Co. v. Lieserowitz*, 197 Ill. 607-612; *E. J. & E. R. Co. v. Lawler*, 239 Ill. 621-630.

The court did not err in giving the seventh instruction. *Chicago C. Ry. Co. v. O'Donnell*, 203 Ill. 261.

The defendants' eighth instruction is a cautionary instruction, and the court did not err in giving the same.

Finding no reversible error in the record, the judgment

of the trial court will be affirmed.

Judgment affirmed.

Not to be Reported

OK
FILED
FEB 17 1925
ST. LOUIS
FOURTH DIST. COURT
Term No. 41

In The
APPELLATE COURT OF ILLINOIS,
Fourth District.

2411.A. 639

OCTOBER TERM, A. D. 1925:

ST. LOUIS RACINE RUBBER COMPANY,)	
Appellee.	(	Appeal from the
)	
-vs-	(	City Court of
)	
OTIS L. BOYD,	(	Alton, Illinois
Appellant.)	

OPINION by BOGGS, P. J.

Appellee brought suit against appellant and one Ernest Larsch in a justice court at Alton, Illinois, to recover a balance claimed by appellee for automobile tires sold to Boyd and Larsch while the latter were engaged in the automobile accessory business in said city. Judgment having been rendered in favor of the defendants in said justice court, an appeal was taken by appellee to the city court of Alton, where a trial was had, resulting in a verdict in favor of appellee for the sum of \$317.45. The defendants in the lower court entered a motion for new trial, which was overruled and judgment was entered against "the defendant" for the amount of said verdict and costs of suit. To reverse said judgment, appellant prosecutes this appeal.

The record discloses that appellant and said Larsch were engaged as partners under the name of the Alton Racine Tire Company, in handling automobile accessories in said city. From

February 15th to May 28th, 1924, they ordered goods from appellee, amounting in the aggregate to \$1,115.57. This account was credited by payments and return of goods in the amount of \$723.12, leaving a balance unpaid of \$317.45. Appellant and Larsch had given orders to appellee for goods shipped on what was termed a dating order, one-third of the amount falling due April 10th, one-third May 10th, and one-third June 10th. On April 22nd, appellant visited the office of appellee and paid the April 10th payment.

As to the foregoing statement of facts there is no controversy. Counsel for appellant in his argument stated: "There is no controversy as to the goods sold nor the price charged therefor. The sole and only question or issue in this case is, who was to pay the amount involved?"

Appellant testified to the effect that at the time he paid the April 10th payment, he introduced a Mr. Marsh to Thomas W. Hayes, sales manager for appellee, and stated to Hayes that prior thereto he had purchased the interest of his partner Larsch, and had made settlement with him; that he was retiring from business and was selling out his business to Marsh and that Marsh was succeeding him. He further testified that: "Mr. Hayes said that was alright; they wanted somebody to represent them in Alton and they said it was alright. I said, 'You come and check on the tires to see that it is alright,' and he said I will come down, but he never did.

"Q. Did you at that time say anything to Mr. Hayes that if you turned this over to Marsh that they would look to Marsh for the balance due

"A. I did

"Q. What did he say about that

"A. He said it was alright

"Q. He said he would do that

"A. Yes Sir."

Appellant offered in evidence a letter dated May 21st,

1924, written by E. W. Roach, one of the men in charge of appellee's business, to J. W. Marsh. Said letter acknowledged the receipt of an order for goods, and referred to a statement in the letter written by Marsh, to the effect that he would take care of his account as soon as he could.

On behalf of appellee the witness Hayes specifically testified that appellant informed him that Larsch was retiring from the business, that he, appellant, had bought him out and that Marsh was to be his partner in the business. E. W. Roach, credit manager for appellee, testified in corroboration of the testimony given by Hayes.

It is conceded by appellant that the evidence is sharply conflicting. In his argument he states: "Standing alone, we may well say that the verdict of the jury is conclusive as to the facts, amid such a conflict in the evidence." It was therefore a question for the jury as to what in fact was said in the conversation testified to, and as to what it proved.

Appellant next insists that the court committed reversible error in giving the one instruction given on behalf of appellee. This instruction presented appellee's theory of the case, and while not as carefully drawn as it should have been, it states a correct principle of law and the court did not err in giving the same.

It is next insisted that the trial court committed reversible error in entering a judgment against "the defendant" instead of "the defendants," there being two defendants. The record discloses that the suit was brought against appellant and said Larsch, and was so carried through the justice and city court. The verdict of the jury on the issues was in favor of the plaintiff. It was therefore a finding against both defendants. We are of the opinion and hold that, under the provisions of the statute of Amendments and Joinders, the trial court would, at a term subsequent to the rendition of judgment, be warranted in amending the same so as to show a judgment against "the defendants." This

holding, we think, is supported by the supreme and appellate courts of this state. *Erst-Tossetti Brewing Co. v. Koehler*, 200 Ill. 269; *Bledsoe v. Ziegenhaien Brothers Furn. Co.*, 161 App. 146, citing: *McCrorv v. Hamilton*, 32 App. 420; *American Preserves Co. v. Bishop*, 33 App. 423; *American Preserves Co. v. Bishop*, 38 App. 444; *Denhard v. Dunbar*, 23 App. 266. In the latter case the court at page 269 says:

"Where there is such minute, entry, pleading or files in the cause, the court has power at a subsequent term thereby to amend the record, and will not hesitate under such circumstances to make such amendment in accordance therewith as will advance justice and sustain the rights of the parties." Citing: *Forquer, et al, v. Forquer*, 19 Ill. 68; *McCormick v. Wheeler*, 36 Ill. 124; *Church v. English*, 31 Ill. 122; *Stitt v. Kurtenbach*. 35 App. 38.

And in *Southworth v. People*, 138 Ill. 621, the supreme court made an amendment to a judgment, making it in favor of the People of the State of Illinois instead of the State of Illinois, and the court in discussing this matter says, page 623:

"It may be conceded that there is a technical defect in the form of the judgment as entered by the superior court, but the defect is no ground for a reversal of the judgment. Section 2 of chapter 7 of the Revised Statutes, entitled 'Amendments,' provides: 'After judgment rendered in any cause, any defects or imperfections in matter or form, contained in the record, pleadings, or other proceedings in such cause, may be rectified and amended by the court in affirmance of the judgment, so that such judgment shall not be reversed or annulled.' Section 3 declares that 'no judgment shall be reversed, in the Supreme Court, for mere error in form, if the judgment be for the true amount of indebtedness or damages.'"

We therefore hold that the entering of the judgment as the court did was not reversible error, but that the same may be amended to show a judgment against "defendants" instead of "de-

fendant."

The judgment in this case, being for \$17.45, was in excess of the jurisdiction of the justice. The transcript of the justice shows that the claim filed by appellee was for \$300.00, and the judgment rendered by the justice was for less than said amount. If a motion had been made by the defendants in the lower court to dismiss the proceedings for want of jurisdiction, there is no doubt but that the court would have allowed the motion. Appellant, however, concedes that this error may be cured by a remittitur, and so states in his written argument.

The cause will therefore be reversed and remanded to the city court, to permit appellee, within a reasonable time to be fixed by the trial court, to enter a remittitur of \$17.45, reducing its claim to \$300.00, and upon so doing, and upon paying the costs of this appeal, judgment to be rendered against the "defendants" in the lower court, for \$300.00 and costs. If appellee fails to so reduce its claim and to pay the costs of this appeal, then this cause to stand reversed and remanded generally for a new trial.

Reversed and remanded, with directions.

Not to be Reported

STATE OF ILLINOIS.

APPELLATE COURT.

4th DISTRICT.

OCTOBER TERM, . . . 1925.

48

TERM NO. 17.

P. NO. 21.

241 I.A. 639

THE PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error,
vs.
MATTIE BUCHER,
Plaintiff in Error.

ERROR TO
PERRY COUNTY
COURT.

Bucher, J. - Plaintiff in error was tried and convicted on a charge of having sold intoxicating liquor for beverage purposes. She insists that the information does not charge a criminal offense because it fails to aver that she had no permit from the Attorney General. Neither that officer nor any other person is authorized to issue a permit for the sale of intoxicating liquor for beverage purposes. As she could not lawfully procure a permit for such a sale it was not necessary to aver that she had none.

The evidence on the part of the prosecution fully sustains the charge and the defense was an alibi. Plaintiff contends that because the witnesses for the People were detectives or paid investigators, the testimony on her behalf was more worthy of credit, and for that reason the verdict is against the weight of the evidence. The jury are the judges of the credibility of the witnesses and of the weight to be given their testimony. In the state of the record we would not be warranted in setting aside the verdict. The court did not err in the admission or exclusion of evidence or in its ruling on instructions. The judgment is affirmed.

al to be reported

AFFIRMED.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, 1925.

TERMINED. 20.

241 I.A. 639

HENRY J. SUMNER,
Appellant,

APPEAL FROM

S. C. CIR.

FEB 17 1926

HENRY B. GUNDLACH, et al.,
Appellees.

CITIZEN COURT.

RECEIVED 1926
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Barry, J. - In 1921 appellees constructed a dam about 520 feet long and 2½ feet high at the outlet of Little Swan Lake. Appellant filed a bill of complaint in which he prayed that appellees be compelled to remove the said dam. Upon the hearing the court found, inter alia, that on December 23, 1923, the top of the dam had washed off about one foot and at the speedway it had entirely washed away for a width of three feet, but that on account of the narrowness of that outlet as compared with the width of the outlet of 150 feet before the dam was built, the water is held back on appellant's land in times of high water. The decree ordered appellees to remove such part of the dam as was constructed upon the outlet of Little Swan Lake as it existed in the year 1921. There was no appeal from that decree and it remains in full force and effect.

On petition of appellant, appellees were cited to show cause why they should not be punished for contempt of court in refusing and failing to comply with the provisions of the decree. Upon a hearing the court found that appellees were not guilty and costs were adjudged against appellant.

The testimony on behalf of appellees is to the effect that they entirely removed the middle 150 feet of the dam, that is, to

say, that part of the dam that was constructed upon the outlet of Little Swan Lake as it existed in 1881. If that testimony is true appellees had complied with the decree and were not in contempt of court. Appellant insists that while appellees removed 150 feet of the dam they did not remove it to the depth of the outlet as it was in 1881. There is a decided conflict in the evidence bearing on that question. The trial court saw and heard the witnesses and was in much better position to weigh their testimony than we can from an examination of the record. We cannot say that the finding of the court is manifestly against the weight of the evidence. In the state of the proof we would not be warranted in holding that the court reached an erroneous conclusion.

Appellant argues that until appellees have removed the entire dam for its full length of 320 feet they will not have complied with the spirit or letter of the decree. The decree found, as we have shown, that the width of the outlet of Little Swan Lake was 150 feet before the dam was built, and appellees were ordered to remove, not the entire dam but only such part thereof as was constructed upon the outlet as it existed in 1881.

Appellant abided by that decree and cannot be held to say, in this proceeding, that appellees should be required to remove the entire dam for its full length of 320 feet. There is no reversible error and the decree is affirmed.

AFFIRMED.

Not to be reported



- Transcript of record made
by Moses Pulverman, Denton, W. Va. to
the Supreme Court with application
of the Court of Chancery 11/1/22 - 1/1/23

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1935.

TERM NO. 42.

NOV. 14.

241 I.A. 640

H. A. BONCANTON,
Appellee,

VS.

J.A. SMITH, et al.,
Appellants.

APPEAL FROM

FRANKLIN

CIRCUIT COURT.

Barry, J. - Appellants executed and delivered three judgments notes to the Standard Auto Insurance Association of Indiana, which were endorsed and delivered to appellee for a valuable consideration before maturity. Appellee procured a judgment by confession which was opened with leave to plead. The general issue was filed and it was stipulated that all evidence might be introduced that would be admissible under special pleas properly pleaded. At the close of the evidence the court directed a verdict in favor of appellee.

Appellants contend that the notes are null and void because the payee is a foreign corporation that was doing business in this State without authority of law and that the court erred in refusing to permit them to offer evidence to that effect. The contention cannot be sustained. When appellants executed and delivered the notes they engaged that they would pay them according to their tenor and admitted the existence of the payee and its capacity to endorse the same, Ill. Neg. Inst. Act, Sec. 66. The fact that the payee is a foreign corporation and was doing business in this State without a license was no defense, *Craig Mfg. Co. vs. Bonus*, 177 App. 626.



It is argued that the Court erred in refusing to permit appellants to prove that the title of the payee was defective; that they were entitled to make such proof in order to put the burden on appellee of showing that he was a bona fide holder in due course under section 59 of the Negotiable Instruments Act. The evidence sought to be introduced did not tend to establish any of the defenses which may be made against a holder in due course under sections 56 and 57 of said Act. Appellee, in the first instance, assumed the burden of showing that he was a holder in due course and his testimony clearly established the fact and no contradictory evidence was offered.

Appellants argue that the court erred in directing a verdict. We find no evidence in the record tending to prove any of the defenses which may be made against a bona fide holder in due course, nor is there any evidence tending to show that appellee was not such a holder. The court committed no error in that regard and as no reversible error has been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported



PK

FILE

RECEIVED FOR DEPOSIT

DEPOSIT NO. 312



APPELLATE COURT

4th DISTRICT.

OCTOBER TERM, A. D. 1925.

241 T.A. 640

TERM NO. 48.

NO. NO. 35.

TONY VOUDRIE,
Appellee,
vs.
THE EAST SIDE LEVEE
AND SANITARY DISTRICT,
Appellant.

APPEAL FROM
32. BLAIR
CIRCUIT COURT.

FILED

FEB 17 1925

Robert B. Rice
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Barry, J. - In the first count of his declaration appellee averred his ownership of certain real estate which he had under cultivation; that appellant so constructed a ditch on its premises as to remove the lateral support of appellee's land; that by reason thereof a portion of his premises, as well as his crops, have been destroyed. The second count charged that appellant constructed a canal across his premises and for some distance above and below the same and thereby caused great bodies of water to collect and remain upon his said lands; that the levees prevented the water from following a previous natural water-course; that appellee's lands were thereby flooded and his crops destroyed. Appellant filed the general issue and a special plea in which it was averred that it acquired the right to construct the canal and levees upon appellee's lands under eminent domain proceedings in which appellee was allowed and paid compensation for land taken and damages to land not taken. The trial resulted in a verdict and judgment for 448.20.

Appellant contends that the damages to lands not taken which were allowed in the condemnation proceeding, included the damages sought to be recovered herein and for that reason the court

should have directed a verdict in its favor. The record does not disclose that, at the time of said proceeding, it was contemplated that the levees would be constructed without openings for the accommodation of the waters of a natural water-course crossed by the canal. There is evidence to the effect that the construction of the canal and levees cut off a natural water-course from its outlet; that appellant also removed a 36 inch tile drain and the water which had been carried therein had no outlet; that appellant undertook to take care of that water by constructing an open ditch, but the ditch soon filled and ceased to function and appellee's lands were flooded and his crops destroyed.

While all damages necessarily resulting from a proper construction of an improvement of the character made by appellant were included in the damages awarded in the condemnation proceeding, yet appellant was not authorized to negligently construct the improvement in such a manner as to injure appellee in the use of his lands. It was the duty of appellant to make suitable provisions for taking care of the water of a natural water-course. It had no authority to cut off a natural water-course from its outlet without providing some proper method of taking care of the water that was thus interfered with, *P. & M. Ry. Co., vs. Phillman*, 145 Ill.127.

It is argued that the court erred in giving appellee's second instruction. In its motion for a new trial and in the assignment of errors complaint is made of the 3rd. and 4th. instructions given for appellee, but no complaint is made of his second instruction. The question as to the correctness of the court's ruling on the second instruction is not properly before us. It is argued that the court admitted improper evidence as to the value of the crops. The abstract discloses that practically all of the evidence bearing upon that question was admitted without objection. A few objections were made upon which appellant procured no ruling of the court. The evidence which was received without objection was sufficient to support the verdict. It is finally argued that the damages awarded

by the jury are excessive. Appellant offered no evidence as to the amount of the damages. That offered by the appellee, and which was received without objection on the part of appellant, was sufficient to support the finding of the jury.

No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported

STATE OF ILLINOIS
APPELLATE COURT
IN THE FIRST JUDICIAL DISTRICT

OCTOBER TERM, A. D. 1935.

241 I.A. 640

TERM NO. 55.

NO. 1. 2.

BENJAMIN ZOONER, :
Appellee, : APPEAL FROM
: :
: :
: :
SAMUEL W. ANDREWS, :
Appellant. : COURT.

Barry, J. - Appellee secured a verdict and judgment for \$44,000 for injuries to his person and damages to his car resulting from an automobile collision on the hard road known as the National Trail at a point about two miles west of Mulberry Grove, Illinois.

Appellant was driving east and in attempting to pass a team and wagon going in the same direction, collided with appellee who was coming from the opposite direction. Appellant contends that he was not negligent and that appellee was guilty of contributory negligence. It would serve no useful purpose to set out the evidence relied upon by the parties as supporting their respective claims. It is sufficient to say that a careful consideration of all the evidence leads to the conclusion that it is of such a contradictory nature we would not be warranted in holding that the verdict is manifestly against the weight of the evidence.

It is argued that the judgment should be reversed because some of the instructions given on behalf of appellee were mere abstract propositions of law. The instructions complained of did not contain any incorrect rule of law, assume the existence of facts or direct a verdict. They contained nothing calculated to

mislead the jury. That being true there was no reversible error in the giving of those instructions, *Taylor vs. Telsing*, 164 Ill. 301. We are not impressed with the criticism of appellee's third instruction. The instructions given on behalf of appellant were more favorable to him than the law would warrant. We find no error in the admission or exclusion of evidence and the judgment is affirmed.

AFFIRMED.

Not to be Reported

FEB 17 1925

OCTOBER TERM, A.D. 1925.

MAILED NOV 10 1924
U.S. DEPT. OF JUSTICE
SOUTH DISTRICT OF IOWA

TERM NO. 56.

241 I.A. 640

FRANK BERRY,	:	
Appellant,	:	APPEAL FROM
	:	
	:	MADISON
	:	
JACOB E. EBBLE, et al,	:	CIRCUIT COURT.
Appellees.	:	

Barry, F. - Appellant averred in his bill for injunction that he is the owner of the Northeast Quarter of the Southeast Quarter and that appellees are the owners of the North Half of the Northeast Quarter all in Section 22, Town 5 North, Range 9 West of the 3rd. P. M.; that the lands north of appellees' tract are higher and water flowing thereon in a state of nature would flow upon and across appellees' land in a general southwesterly direction through certain water-courses or depressions therein; that for a long time prior to 1910 there was an artificial ditch along and upon the east and south sides of appellees' land through which a part of the water coming from the north flow^{ed} south to the southeast corner of appellees' land and thence west along the south side thereof, but in times of heavy rains or high water said ditch over-flowed and the larger portion of the water flowed to the southwest across appellees' land without coming upon the lands of appellant; that about 1911 the then owner of appellees' land built a levee upon the west side of said ditch which prevented the water from flowing southwesterly as in a state of nature it was accustomed to do and caused the same to flow to the east upon lands adjoining appellees' tract and from there it flowed in a south westerly direction upon appellant's land.

The bill further averred that appellees purchased their tract of land in 1917 and have permitted the said levee to remain thereon to the injury of appellant; that instead of removing the same they have strengthened and raised the levee so that none of the water now passes over their land and by reason thereof the water is cast upon the lands to the east and thence upon the lands of appellant; that by reason of the levee the east bank of the ditch running north and south has been washed away and the water flows in great volume over the lands to the east and thence over appellant's land and has washed out the levee on the south side of the ditch running east and west; that great quantities of water which would not have reached appellant's land have been cast thereon to his damage. The bill prayed that appellees be required to abate the nuisance by removing the levee or opening it in such a manner as to permit the flow of water as in a state of nature, or in the alternative that they be required to maintain said artificial ditch by means of additional embankments on the east and south sides thereof so that no water, which in a state of nature would have passed over appellees land, would be cast upon the land of appellant. Upon a hearing the court entered an order dismissing the bill for want of equity at the cost of appellant and awarded an execution therefor.

Appellees moved for a dismissal of the appeal on the ground that no decree was entered by the trial court. The record discloses that the court entered an order dismissing the bill for want of equity at the costs of appellant and awarded execution therefor. That was a final disposition of the matter and a more formal decree was not required. The motion to dismiss the appeal is denied.

Appellees' land is immediately north of appellant's and is directly west of and adjoins the 160 acre farm of Mr. and Mrs. Westerhold. The artificial ditch mentioned in the bill of complaint runs south a half mile between the farms of appellees and the Westerholds and then turns west and runs a quarter of a mile between the lands of appellant and appellees. That ditch has been in use

for fifty years and there has been more or less of a levee on either side thereof. In very wet weather the water would spread out, some of it flowing to the southwest over appellees' land and some to the southeast over the Westerhold farm and from thence to and upon the lands of appellant. In 1910 Mr. Henry owned the land now owned by appellees. In that year he raised and strengthened the levee on the west side of the ditch and about that time or a little later the Westerholds raised and repaired the levee on the east side of the ditch. After appellees purchased their land in 1917 they raised and repaired the levee from time to time on the west side, and the Westerholds did likewise on the east side of the ditch. Appellant and appellees worked together and cleaned out the ditch between their farms and raised the levee on either side thereof.

It is the contention of appellant that appellees have raised the levee on the west and north sides of the ditch to such an extent that none of the flood water now flows over their lands but the same is forced upon the lands of the Westerholds' and from thence upon the lands of appellant. There is evidence to the effect that in times of high water the ditch still overflows and the water spreads out over the lands of all the parties the same as it did prior to 1910.

Appellees filed a cross-bill against appellant and the Westerholds in which they averred that they were willing to remove the levee on the west and north sides of the ditch if the defendants to the cross-bill would remove the levee from the east and south sides thereof, and the cross-bill prayed that the defendants thereto be required to remove the same. Appellant answered the cross-bill denying that he kept and maintained a levee on the south side of the ditch and denying that it would be unfair to require appellees to remove that levee or the levee on the west and north sides of the ditch. He also claimed by his answer that he was entitled to the relief prayed in his original bill without being required to remove the levee from the south side of the ditch.

Appellant admitted in his testimony that he had assisted appellees in raising and repairing the levee on the north side of the ditch and that appellees had worked with him in raising and repairing the levee on the south side thereof.

It is quite apparent that if the levee on the east and south sides of the ditch are permitted to remain and appellees are required to remove the levee on the west and north sides thereof a much greater volume of water would be cast upon the lands of appellees than ⁷ ever before. The court probably reached the conclusion that appellant was not willing to do equity, and that he failed to prove that appellees had done anything to cause more water to flow upon his land than had previously reached the same or would reach his land in a state of nature. In the state of the record we do not feel warranted in holding that the court erred in dismissing the bill for want of equity.

Appellant contends that the court erred in dismissing his bill without passing upon the issues raised by the cross-bill and answers thereto. The record does not disclose any action of the court with reference to the cross-bill. If the court erred in that regard, which we do not deem it necessary to decide, it is a matter of which appellant is not entitled to complain. The decree is affirmed.

Not to be reported

AFFIRMED.

OCTOBER TERM, . D. 1925.

D. E. MACLEIFF, :
Plaintiff in Error, : ERROR NO
VS. :
WALTER A. KELLY, : MADISON
Defendant in Error. : CIRCUIT COURT.
TERM NO. 58.

241 I.A. 640
AG. NO 50

Barry, J. - The Tri-City State Bank filed a bill of interpleader in which it averred that plaintiff in error and defendant in error were both claiming a fund of \$700.00 which plaintiff in error had deposited with it under the terms of a certain writing in words and figures as follows:-

"Whereas, D. E. Macleiff, of the village of Madison, County of Madison, and State of Illinois, has this day deposited with the Tri-City State Bank of Madison, Illinois, the sum of \$700.00, and has caused the said Tri-City State Bank to issue its Cashier's Check in the sum of \$700.00, payable to the order of Tri-City State Bank, the said Cashier's Check being number 3043, the undersigned . E. Macleiff directs that the said Cashier's Check shall be held by the Tri-City State Bank under the following conditions:-

"Whereas, Jim Kondoff and Tony Kondoff of the City of St. Louis, are the defendants in a deportation proceeding and prosecution against them by the United States Immigration Department; and,

Whereas, the said Jim Kondoff and Tony Kondoff are represented in said proceeding by Walter A. Kelly, Attorney at Law, with an office in the Times Building, Broadway and Chestnut, St. Louis, Missouri; and,

Whereas, the said Walter A. Kelly is to be paid the sum of \$700.00, in addition to what he has already received, in the

event that the said Jim Kondoff and Tony Kondoff are not deported but are permitted to remain in the United States, in the event that the deportation proceedings now pending against them are dismissed.

"Therefore, the undersigned, D. E. Macelieff, directs and instructs the said Tri-City State Bank to endorse the aforesaid Cashier's Check and deliver same to Walter A. Kelly upon proper proof being presented to said bank that the said deportation proceedings have been dismissed, and that the Tri-City State Bank shall endorse and deliver the said Cashier's Check to the undersigned, D. E. Macelieff, in the event that the said Jim Kondoff and Tony Kondoff are deported by virtue of the said deportation proceedings.

"Dated this 25th day of January, A. D. 1935.

D. E. Macelieff."

Plaintiff in error answered the bill claiming that he made the deposit in the said bank on the terms stated in said writing; that defendant in error was the attorney for the Kondoffs in the deportation proceedings which resulted in an order that they be deported and that by reason thereof defendant in error is not entitled to the fund in question but that the same is the property of plaintiff in error.

Defendant in error answered, in substance, that the Kondoffs employed him to represent them as their attorney in the said deportation proceedings and agreed to pay him, unconditionally, \$1,000.00 for his services and \$200.00 to cover all expenses; that they paid him \$500.00^{and} before the case was finally determined he insisted that they pay him the balance of \$700.00 or that the said sum be deposited in some bank to his credit; that plaintiff in error was indebted to the Kondoffs in excess of \$700.00 which plaintiff in error was holding pending the suit because he had signed their bond in that proceeding; that plaintiff in error knew of defendant in error's demand on the Kondoffs and that he agreed to pay \$700.00 to the Kondoffs so that the same might be deposited in a bank to the credit of defendant in error; that thereafter plaintiff in error and the cashier of the said bank notified defendant in error that said sum of \$700.00 had been deposited as required by him; that defendant in error thereupon proceeded with the defense of the suit

and fully complied with his part of the contract and is entitled to the said fund of \$700.00.

The Court found the facts to be as averred in the answer of defendant in error and ordered that the said fund be paid to him.

Defendant in error testified that he wanted plaintiff in error to give him the \$700.00 in cash but plaintiff in error said he did not want to do that; that defendant in error then wanted him to put it in the bank to defendant in error's credit, but that plaintiff in error said he would put it in the bank in Illinois; that defendant in error said that would suit him. Defendant in error also testified that there were no conditions other than that the money was to be deposited in the bank to his credit. The averment of his answer was that plaintiff in error agreed to pay the said sum of \$700.00 to the Kondoffs so that the same might be deposited in the bank to the credit of defendant in error. Defendant in error does not claim in his testimony that plaintiff in error ever notified him that the deposit had been made. He does say that the cashier of the bank informed him, in answer to his inquiry, that \$700.00 had been deposited. Plaintiff in error testified that he never at any time agreed to deposit \$700.00 to the credit of defendant in error except upon the conditions mentioned in the writing hereinabove set forth.

On February 25, 1935, plaintiff in error drew his check for \$700.00 on the Tri-City State Bank, payable to its order, and on the same day the cashier of the bank gave him a receipt for the \$700.00, reciting that said sum was to be held by the bank in escrow, as per agreement on file with Cashier's Check No. 5045. The record shows that an order for the deportation of the Kondoffs was entered; that they disappeared and ~~the~~ ^{the} suit upon their bond in the sum of \$2,000.00 and against plaintiff in error as their surety is pending in the Federal Court.

If plaintiff in error's testimony is true, defendant in error has no claim whatever upon the fund in question. If plaintiff

in error agreed to deposit \$700.00, unconditionally, to the credit of defendant in error, as contended by the latter, there was simply a breach of that agreement because no such deposit was made. We cannot understand how such a breach can confer any right upon defendant in error to this particular fund. If plaintiff in error had \$700.00 to his own credit in his checking account and had not placed it in the hands of the bank under the escrow agreement, no one would seriously contend that if he agreed to deposit that amount to the credit of defendant in error and failed to do so that the latter would be entitled to the particular fund on deposit to the credit of plaintiff in error. The conditions recited in the escrow agreement were never complied with, and defendant in error has shown no right to the fund.

Defendant in error argues that the findings of the Master were not objected to by plaintiff in error. The transcript of the record shows that plaintiff in error filed objections to the Master's report. The decree recites that plaintiff in error filed objections with the Master which were later overruled by the Master and that he then filed his exceptions to the Master's report. It is apparent, therefore, that the contention of defendant in error is not supported by the record.

The decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree that the fund in question be paid to plaintiff in error.

REVERSED AND REMANDED
WITH DIRECTIONS.

Not to be reported

114.

Manuscript of record made by [unclear]
East [unclear] to file in [unclear] [unclear] [unclear]
[unclear] [unclear] [unclear] [unclear] [unclear]

In The Appellate Court
Fourth District.

October Term, A. D. 1925.

Maria Burkhardt,
Appellee

vs.

East St. Louis Rendering Co.,
Appellant.Appeal from City Court
of East St. Louis.

241 L.A. 841

FEB 17 1925

OPINION BY HIGBEE, J.

This is an action brought by Maria Burkhardt, appellee, against the East St. Louis Rendering Company, appellant, to recover damages for personal injuries alleged to have been suffered by her on the 31st of March, 1924, while attempting to alight from a street car at the intersection of 11th and State Streets in East St. Louis. The declaration consists of three counts. The first count is based upon general negligence and charged that appellee received the injuries in question as a result of the careless negligent and improper management and operation of appellant's truck. The negligence charged in the second count was a violation of the following ordinance of East St. Louis: "Sec. 15. In approaching or passing a street railway car, which has been stopped for the purpose of receiving or discharging passengers, the operator of every motor vehicle or motor bicycle shall not drive such vehicle or bicycle within ten feet of the running board or lowest step on such car, except by the express direction of the traffic officer." The negligence upon which the third count of the declaration is based was a violation of the following ordinance of said city: "Sec. 29. No vehicle overtaking a street car shall pass the same on the left side thereof. Such driver of the overtaking vehicle shall stop such vehicle and remain at the rear of any street car which has stopped to take on or let off passengers so as to allow free passage between such street car and the curb, and such driver shall cause his vehicle to remain standing until such street car has resumed motion; provided that ^{vehicles may} pass a standing street car on the right where a space therefor is provided and distinctly marked and indicated by standards, chains

October Term, A. D. 1928.

Burkhardt,
Appellee

vs.

St. Louis Rendering Co.,
Appellant.

Appeal from City Court
of East St. Louis.

2117 A. 841

FEB 17 1929

OPINION BY HIGBES, J.

This is an action brought by Maria Burkhardt, appellant, to recover damages

at St. Louis Rendering Company, appellant, to recover damages

personal injuries alleged to have been suffered by her on the

of March, 1924, while attempting to alight from a street car at the

section of 11th and State Streets in East St. Louis. The decedent

consists of three counts. The first count is based upon general

negligence and charges that appellee received the injuries in question as
result of the careless negligent and improper management and operation

of the following ordinance of East St. Louis: "Sec. 15. In

stopping or passing a street railway car, which has been stopped for

purpose of receiving or discharging passengers, the operator of every

vehicle or motor bicycle shall not drive such vehicle or bicycle

within ten feet of the running board or lowest step on such car, except by
express direction of the traffic officer." The negligence upon which

the second count of the declaration is based was a violation of the follow-
ing ordinance of said city: "Sec. 39. No vehicle overtaking a street car

shall pass the same on the left side thereof. Each driver of the over-

taking vehicle shall stop such vehicle and remain at the rear of any street
car which has stopped to take on or let off passengers so as to allow free

passage between such street car and the curb, and such driver shall remain

stopped until such street car has resumed motion

as a standing street car on the right where a space there-

is provided and distinctly marked and indicated by standards, chains

or other markers". Appellant filed a plea of the general issue. On the trial before a jury a verdict was returned in favor of appellee in the sum of \$2000.00.

As Appellee was alighting from a street car at the intersection of 11th and State Streets in East St. Louis on the 21st of March, 1924, a motor truck, belonging to appellant, struck the door of the street car after it had been opened by the motorman, and the appellee was knocked down by the door hitting her.

Appellant contends that its truck was being driven along side of the street car as the car was proceeding easterwardly on State Street, and that when the street car stopped at the intersection in question the driver of the truck also stopped "leaving a space of 5 or 6 feet between the front end of the motor car and the front door of the street car"; that an Overland car collided with the rear end of appellant's truck causing the truck to be shunted forward, and to collide with the door of the street car which had been opened by the motorman, and that the door struck appellee.

There is evidence in the record tending to support appellant's contention that an Overland car collided with the rear end of the truck and caused it to hit the street car door. However the evidence is quite clear that the truck was closer than ten feet to the running board or lower step of the street car in violation of the ordinance set out in the second count of the declaration. Nor is there any question but that the driver of the truck had passed the rear end of the street car before the truck was brought to a stop, in violation of the ordinance set out in the third count of the declaration. The driver of the truck himself testified that the truck when stopped was only about 6 feet behind the front step of the street car. In our opinion this proof clearly establishes the negligence of appellant even though the proof may show as contended by appellant that the truck was struck by the Overland car.

Had appellant's truck been at a distance of ten feet from the street car as required by the ordinance set out in the second count or had the

On the 10th day of March, 1924, Appellant filed a plea of the general issue. On the 11th day of March, 1924, a verdict was returned in favor of Appellee in the sum of \$2000.00.

Appellee was driving from a street car at the intersection of State Streets in East St. Louis on the 10th of March, 1924, a truck, belonging to Appellant, struck the door of the street car.

Appellant contends that the truck was being driven along side of the street car as the car was proceeding easterly on State Street. The street car stopped at the intersection in question the day of the truck also stopped "leaving a space of 5 or 6 feet between the motor car and the front door of the street car"; that the truck collided with the rear end of Appellant's truck causing the truck to collide with the door of the street car.

There is evidence in the record that the truck and the street car collided with the rear end of the truck and the street car. It is also stated in the record that the truck was driving from the rear of the street car. Now is there any question but that the driver of the truck had caused the collision with the street car before the collision with the street car?

The driver of the truck himself testified that the truck was driving from the rear of the street car. It is also stated in the record that the truck was driving from the rear of the street car. Now is there any question but that the driver of the truck had caused the collision with the street car before the collision with the street car?

truck stopped at the rear of the street car as required by the ordinance in the third count it would not have been possible for it to have collided with the street car door, even though the Overland car did run into it. For the driver to stop as close to the street car and so near the front of the street car as he did was clearly negligence upon his part.

Considerable portion of the argument for appellant is devoted to the contention that if the truck did strike the street car door because it was hit with the Overland car then the negligence of its driver was not the proximate cause of the injury but that the proximate cause of the injury was the collision of the Overland car with appellant's truck. Had he exercised the care required by the ordinance, the driver of the truck might have avoided the injury. The mere fact that the injury would not have happened but for the negligence of the driver of the Overland car is not sufficient to exonerate appellant, if appellee was in fact injured by the combined negligence of both the driver of the truck and the driver of the Overland car. (Sullivan vs. Ohlhaber Co. 291 Ill 359). In order to make the negligent act of the driver of the truck the proximate cause of appellee's injury it is not necessary that her particular injury and the particular manner of its occurrence could reasonably have been foreseen by the driver of the truck. If the consequences follow in an unbroken sequence from the wrong to the injury without an intervening efficient cause it is sufficient if at the time of the truck driver's negligence he might by the exercise of ordinary care have foreseen that some injury might result from his negligence. (I.C.R.R.Co. vs. Siler, 229 Ill. 390).

The first instruction given in behalf of appellee in reference to the measure of damages authorized a recovery for hospital expenses. There was no evidence offered as to any hospital expenses. After reading the instruction ^{attention of the} the court was called to this fact and he struck out that portion of the instruction, and then stated orally to the jury,

...the street car door, even though the Overland car did run into it.
...the driver to stop as close to the street car and so near the front
...the street car as to all circumstances and conditions.
...contention that if the truck did strike the street car door because
...the proximate cause of the injury but that the proximate cause of the
...was the collision of the Overland car with appellant's truck. Had
...the driver of the truck, the driver of the truck
...the injury. The mere fact that the injury would not
...for the negligence of the driver of the Overland car
...the driver of the truck. (Sullivan vs. Chalmers Co. 231 Ill. 553). In order
...the driver of the truck the proximate cause of
...the injury it is not enough that the proximate cause of the
...of its occurrence could reasonably have been foreseen by
...the driver of the truck. In the case of the driver of the truck
...the driver of the truck. (Sullivan vs. Chalmers Co. 231 Ill. 553).
...the driver of the truck have have foreseen that some injury might result
...R. Co. vs. Allen. 229 Ill. 540).
...the driver of the truck in reference to the
...After reading the

"Gentlemen of the jury: The attention of the Court has been called to the fact that in one of the instructions I gave you it was stated that if you found for the plaintiff you should award her the expense she was put to for hospital services. There was no proof in this case of any amount expended for hospital services, and you will, therefore, disregard that element of the instruction. Plaintiff has not proven any amount expended for hospital services, and therefore, you should allow nothing for that." It is contended that this action of the court was error in that it in effect advised the jury that while it could not allow appellee anything for hospital services it should allow her for everything else. We think there is no merit in this contention.

The third instruction in behalf of appellee in substance advised the jury that if it believed from a preponderance of the evidence that the driver of the truck violated the city ordinance set out in the second count of the declaration, and if it further believed from a preponderance of the evidence that such violation of the city ordinance approximately caused the injury to appellee while she was in the exercise of due care and caution, then the fact that the truck was struck by some other motor vehicle, if the jury believed it was, would be immaterial and might be disregarded. Complaint is made that the word "approximately" is used in this instruction instead of the word "proximately". While the latter word was the correct term to have been used, in stating the law applicable to the case, yet, it does not appear to us that the jury could have been misled by the use of the other word, especially in view of the fact that the word correct word was used under similar conditions in the following instruction.

The fourth instruction in behalf of appellee was similar to the third instruction in theory but was based upon the violation of the ordinance contained in the third count of the declaration, and in our opinion correctly stated the law.

It is claimed by appellant that the damages allowed appellee were

excessive. Appellee was confined to the hospital for two weeks, and was attended by her physician for some time after that. She testified that at the time of the trial more than fourteen months after the accident, she was still suffering from pain and unable to do work which she had done before that time, and in this she was to some extent corroborated by other testimony.

In the case of ^{ex}~~Klostermeier~~ vs. St. L. S. & P. R. Co. 222 Ill. 374, ^{App.} where appellee, a woman, received personal injuries on an interurban car of appellant, somewhat similar to those described in this case, although at the time she did not appear to have suffered any serious injury, this court sustained a verdict and judgment for \$3500. The opinion in that case states ~~that~~ "we would not be warranted in reversing the judgment on the ground it was excessive as we ^{are} ~~were~~ unable to say that the jury in fixing the amount of damages were governed by prejudice or passion." What was said there applies with equal force here. The judgment will be affirmed.

AFFIRMED.

Not to be Reported

Appellee was confined to the hospital for two weeks, and

attended by her physician for some time after that.

At the time of the trial more than fourteen months after the

accident, she was still suffering from pain and unable to do work which

was done before that time, and in this she was to some extent corroborated

by her testimony.

In the case of *W. J. Forester vs. St. L. & L. R. Co.*, 111 Ill.

Appellee, a woman, received personal injuries on an interurban car

accident, somewhat similar to those described in this case.

She did not appear to have suffered any serious injury, this

was sustained a verdict and judgment for \$500. The opinion in that

case would not be warranted in reversing the judgment on

appeal as was ^{the} appellee unable to say that the jury in

the case of damages were governed by prejudice or passion. That

The judgment will be affirmed.

Not to be taken

Appellate Court
Fourth District

October Term, A. D. 1925.

Gaerdner & Company,

Appellee

vs.

Louis Kalkbrenner,

Appellant.

APPEAL FROM COUNTY COURT,

ST. CLAIR COUNTY.

241 I.A. 641

OPINION BY HIGBEE, J.

This is a trial of the rights of property. Appellee has not favored us with any brief in this case, but from an examination of the record we find that on July 2, 1923, Peter Gaerdner and Otto Schneider purchased from L. C. Zimmerman, a combination carriage hearse upon which one Anderson Williams held a chattel mortgage for \$1850.00. This hearse was afterwards transferred to Gaerdner & Company, appellee. The Sheriff of St. Clair County levied an execution upon this hearse under a judgment secured by Louis Kalkbrenner, appellant, against "L. C. Zimmerman & Co.," on December 18, 1924. Thereupon appellee filed the notice for trial of rights of property. On hearing the court found in favor of appellee.

The proof shows that appellant's judgment was recovered more than 17 months after the sale of the hearse to Gaerdner and Schneider. While there is some proof slightly tending to show that "L. C. Zimmerman & Co.," was indebted to appellant at the time of the sale, yet the existence of appellant's debt at that time is not established by the record. At the time of the sale of the hearse the purchasers secured a bill of sale from one Anderson Williams, who had a chattel mortgage on the hearse executed by "Zimmerman Undertaking by L. C. Zimmerman". The proof does not show that "L. C. Zimmerman & Co." against whom appellant secured his judgment is the same party as "Zimmerman Undertaking". At the time the hearse was purchased it appears that there was also considerable other property bought, which the evidence seems to show was the

Appellate Court

Fourth District

October Term, A. D. 1925.

FEB 17 1926

RECEIVED
CLERK OF THE DISTRICT COURT
FOURTH DISTRICT OF ILLINOIS

APPEAL FROM COUNTY COURT,

ST. CLAIR COUNTY.

341 I.A. 641

OPINION BY HIGGINS, J.

... sale trial of the rights of property. Appellee has not
... any trial in this case, but from an examination of the
... July 2, 1923, Peter Gaedner and Otto Schneider
... a combination carriage house upon which
... held a chattel mortgage for \$1850.00. This house
... to Gaedner & Company, appellee. The sheriff
... an execution upon this house under a judgment
... appellant, against "L. C. Zimmerman & Co."

... sale of the house to Gaedner and Schneider.
... of a fully paying to show that "L. C. Zimmerman
... at the time of the sale, yet the

100

individual property of Zimmerman himself and not of the firm. It is
contended that the sale was in violation of the Bulk Sales Law, and
therefore void. Under the above facts ^{as} they appear from the record in
this case the Bulk Sales Law would not apply and even if it would, as the
proof did not show that appellant was at that time a creditor of
L. C. Zimmerman or Zimmerman Undertaking Company, he is in no position
to raise that question. The judgment is therefore affirmed.

AFFIRMED.

Not to be reported

It is the property of Zimmerman himself and not of the firm. It is
noted that the sale was in violation of the Bulk Sales Law, and
therefore void. Under the above facts they appear from the record in
this case the Bulk Sales Law would not apply and even if it would, as the
record did not show that appellant was at that time a creditor of
Zimmerman or Zimmerman Undertaking Company, he is in no position
to raise that question. The judgment is therefore affirmed.
AFFIRMED.

Term No.25.

Agenda No.30.

Appellate Court,Fourth District.

October Term,1925.

JOSEPHINE OULVEY,

Defendant in Error

v.

HARVEY S.CONVERSE and FANNIE

CONVERSE,

Plaintiffs in Error

Error to ST. CL. 11.

241 I.A. 641

Opinion by Higbee, J.

---o06---

This is an action in assumpsit brought by Josephine Oulvey, defendant in error, against Harry S. Converse and Fannie Converse, plaintiffs in error, on their promissory note made on July 26, 1911, for the sum of \$9000.00 payable to the order of Henry T. Renshaw, trustee.

It is alleged in the declaration that the note had been endorsed by the payee to Eugene Oulvey, the deceased husband of defendant in error before its maturity, and that thereafter said Eugene Oulvey died testate, being the owner and in possession of said note and by his will bequeathed the same to defendant in error. With her declaration there was filed an affidavit of claim containing the same statement of facts as alleged in the declaration but in more detail. To the declaration plaintiffs in error filed a plea of the general issue and two special pleas. The defenses set up by these special pleas in substance was that Henry T. Renshaw, the payee mentioned in the note was a member of the firm of J. W. Renshaw Sons, and that that firm for a long period of time had acted as the agent of defendant in error's husband, Eugene Oulvey, in the loaning and collecting of his money, and that except as to \$2000 of the principal of said note which was paid in cash to said Henry T. Renshaw the whole note, which was originally

secured by real estate mortgage had been discharged by plaintiffs in error by executing and delivering to Henry T. Renshaw trustee, a new note for \$7000, and a new mortgage securing the same. With these two special pleas, plaintiffs in error filed an affidavit of merits setting forth two defenses namely: (1) That Eugene Oulvey did not own the note at the time of his death, and that defendant in error did not come into possession of said note under his will; (2) that the note had been paid and discharged by the payment on January 26, 1914 of \$2000 on the principal and the executing of a new note and mortgage on the 26th day of January, 1915 for \$7000.00; that said Henry T. Renshaw sold the \$7000.00 to one Joseph Flash, and that one W. F. Niehaus, to whom plaintiffs in error had conveyed their equity in the premises covered by the mortgage securing the note, paid the full amount due on said \$7000 note to Henry T. Renshaw; that said Henry T. Renshaw was the agent of said Eugene Oulvey and authorized to loan and collect money for him, and that defendant in error is bound by the acts of Henry T. Renshaw who received the full amount represented by the note sued on. On the trial replications were filed denying the allegations of the special pleas.

Defendant in error offered the note in evidence. Plaintiffs in error objected to this note for the reason that it had not been shown that Eugene Oulvey was the owner of the note at the time of his death. The court admitted the note, and defendant in error proved the amount of the interest due thereon and rested.

Plaintiffs in error introduced as a witness, W. F. Niehaus, who testified that he purchased the property upon which the mortgages to secure this indebtedness had been given and assumed the indebtedness, but the court sustained an objection to the competency of this witness on the ground that he was interested in the event of the suit. Plaintiffs in error then offered the deposition of Henry T. Renshaw to which the court sustained an objection. The court also sustained objections to the competency of plaintiffs

in error to testify in their own behalf. At the close of all the evidence the court on motion of defendant in error instructed the jury to return a verdict in her favor in the sum of \$7940.34. This was done and judgment for that amount entered thereon which plaintiff in error here seeks to reverse.

It is quite apparent from the deposition of Henry T. Renshaw which is set forth in full in the record, that he was the agent of Eugene Oulvey deceased, in the loaning of his money and the collecting of the same when due. It is also quite apparent that he did receive from defendants in error a new note and mortgage for \$7000 which he later sold. It also appears from this deposition that at the time the new note and mortgage were given, Renshaw turned over to plaintiffs in error the original mortgage, but did not give them the original note which was then in the hands of Oulvey. Renshaw sold the new note, but did not advise Oulvey of this transaction and out of his own funds continued to pay the interest on the old note to Oulvey. This, however, appears only from the deposition of Renshaw which was excluded by the court, and does not appear from any other portion of the record. Without Renshaw's deposition there is nothing to prove his agency. His agency could not be shown by his own statements and declarations. (*Mullanphy Savings Bank v. Schott*, 135 Ill. 655). Therefore until his agency was shown otherwise than by his own declarations, any evidence of the transactions of plaintiffs in error with him was not competent as against defendant in error, and the court did not err in excluding this deposition. The deposition was also incompetent for another reason. Beyond doubt this witness had a direct interest in this suit, and was therefore not competent to testify against defendant in error who sued as a legatee under the will of Eugene Oulvey. Without proof of Renshaw's agency, evidence of payment of the new note to him would not discharge the old note assigned by him before maturity.

The only other ground urged for a reversal of this judgment is that defendant in error cannot maintain a suit at law on this note for the reason that it is endorsed to the order of Eugene Oulvey and is not endorsed by defendant in error by herself as executrix. We are of the opinion that plaintiffs in error cannot, under the pleadings, raise the question. It is well settled that where a plaintiff files an affidavit of claim with the declaration the defendant is limited in his defense to the facts set up in his affidavit of merits. (Benziger v. Mulcahey, 215 Ill. App. 508). This defense is not stated in defendant in error's affidavit of merits and therefore cannot now be raised. The judgment in this case was proper under the evidence and the rules of law applicable thereto and it will therefore be affirmed.

Affirmed.

Not to be reported

Term No.29.

Agenda No.15.

Appellate Court
Fourth District.
October Term,1925.

EDITH WHITE TANNER,)
Appellee)
v.)
HAMMOND E.WHITE,)
Appellant)

Appeal from MARION.

241 I.A. 641

Opinion by Higbee, J.

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This is an appeal from a decree of the circuit court of Marion county, modifying a former decree of that court as to the custody of Mary Alice White, entered in January, 1923. In August, 1922, Edith White, now Edith White Tanner, appellee, filed her bill for divorce against Hammond E. White, appellant. On January 5, 1923, the divorce was granted. The decree of divorce contained findings that there was an agreement between the parties thereto that each of them ^{or} ~~were~~ proper persons to have the care, custody and control of their daughter, Mary Alice White, but that because of appellee's employment she did not have a permanent home at all periods of the year, and it was impractical for her to have the custody of the child during the school year; that appellant was living with his parents whose home was a proper place for the child to be reared; that it would be for the best interest of the child during the school year to remain in the custody of the appellant. The decree directed that during the vacation period appellee should have the custody of the child at her own expense, but should return her to the custody of appellant at least two weeks before the opening of school, provided that appellee should have the right to visit the child during the school year, and should have her over the week ends at least two weeks in each month, but should re-

turn the child to appellant in time to attend school. In January, 1924 appellee was married to one L.O. Tanner, and her home is now in St. Louis, Missouri. On December 30, 1924 appellee filed a petition asking the court to modify the decree of divorce and to award the custody of the child, Mary Alice White, who was then between eight and nine years of age, to her. The court found that appellee was a fit and proper person to have the custody of her child and modified the former decree by giving the care and custody of the child to appellee, providing, however that appellant should have the care and custody of the child from the 15th of June to the 15th of August ^{the} each year, ^{for custody of the child} and ending on New Years day of each year; and that appellant should pay the costs of the transportation of the child from the home of appellee to his home except for the trip made on the 15th of June each year, which should be paid by appellee. The decree further provided that appellee should notify and advise appellant of any changes of address of the child, and that for failure to return the child to appellant on the 15th of June of each year, appellee should be considered in contempt of court. This appeal is perfected from that decree.

In considering this case it is necessary to have in mind the fact that the original decree was, so far as the custody of the child was concerned, a consent decree, and that in such case the burden is upon the party seeking to have the decree modified in that respect to show good reason why the provisions concerning the care and custody of the child should be changed. This appeal is perfected from that decree.

Upon the hearing each party introduced a number of witnesses who testified that the party in whose behalf they were called was a fit and proper person to have the custody of the child. In some instances the testimony of witnesses in behalf of each party was to the effect that the other party was not altogether a fit and proper person to have the custody of the child. Without discussing this evidence in detail we are of the opinion that the evidence fully

justifies the finding of the court below that appellee, the mother of the girl was a proper person to have the custody of Mary Alice. But the evidence also appeared to be that the child was well taken care of by the father, at the home of his parents in the city of Salem, Illinois, and from aught that appears he was also a proper person to have control of his child. It does not clearly appear from the proof how the interests of the child could be better subserved under the modified decree than under the original.

The evidence, however, shows that the home of the mother is now in St. Louis, Missouri, and that it is her intention to remove the child to that state and without the jurisdiction of the circuit court of Marion county. Solicitors for appellant earnestly argue that the trial court was without authority to award the custody of the child to appellee to be removed to another state. The question thus presented, which is a serious one, first arose in this state in the case of *Miner v. Miner*, 11 Ill. 43. In that case the mother had obtained a divorce from the father, and the custody of the child was awarded the mother and she was allowed alimony of \$15 per month, until the questions involved were finally settled. The father appealed from that portion of the decree awarding the custody of the child to the mother. ~~The~~ In that case the Supreme Court said "It is apparent from the record that there is some intention on the part of the mother, if allowed to retain the custody of the child to remove her beyond the limits of the state.. This cannot be tolerated, and must be guarded against. While the custody of the child is given to the mother, the father must not be wholly deprived of its society, but must be allowed access to it upon all reasonable occasions." The Supreme Court affirmed the ~~decree~~ as to the custody of the child upon the condition, however, that the mother enter into a bond in the sum of \$2000., conditioned that the child should not be removed beyond the jurisdiction of the state and should be produced at any time thereafter upon the order of the court.

In Smith v. Smith, 101 Ill. App. 187, the mother of a child, Gladys Smith, had been granted a divorce from Robert S. Smith, the father. The decree provided that T. E. Smith, grandfather of the child should have her custody temporarily and that eventually she should be given into the custody of her father. After the divorce and with the consent of T. E. Smith, the father took the child to New York and placed her in the custody of his aunt. The mother then filed her petition asking that the father be required to return the child to this state. This petition was dismissed by the trial court. On appeal the Appellate Court of the 3rd District reversed the decree and remanded the cause with directions to grant the petition and order that the custody of the child be immediately resumed by T. E. Smith, and that she be kept within the boundaries of the State of Illinois, until the further order of the court. To sustain her position that the order of the court awarding the child to her to be taken to her home in Missouri is proper, appellee refers to Hewitt v. Long, 76 Ill. 399 and Cummins v. Cummins, 29 Ill. 458. That portion of the opinion ⁱⁿ Hewitt v. Long, supra, quoted by appellee is however, from the dissenting opinion filed by Justice Breeze, in that case. There the mother had obtained a divorce from the father on the ground of desertion, and was given the custody of the daughter. The father moved to Iowa where he was married again, and after amassing considerable fortune, sought to have the custody of the daughter, who was then about 14 years of age, awarded to him, that he might take her to his home in Iowa. The Supreme Court, however, refused to award the child to the father. While the court in that case did not base its decision solely upon the ground that the father would remove the child to another state, yet the court did cite with approval the language above quoted from Miner v. Miner in its majority opinion. Justice Breeze in a dissenting opinion stated that the reason given for the ground assumed by the court in Miner v. Miner, supra, did not exist in the Hewitt case.

However if the Hewitt case is applicable at all to the present case it tends to sustain the position of appellant.

The case of Cummins v. Cummins, 29 Ill. 452, is not at all parallel. There was no question in that case, between the parents as to the right to the custody of the child. The father of the child had by his will designated a resident of Indiana as testamentary guardian, and the only question in that case was whether or not such testamentary guardian was entitled to recover from the guardian in this state of the property of the child, his expenses in taking the child to Indiana. Neither is Stafford v. Stafford, 299 Ill. 436 cited by both parties hereto, parallel. In that case the mother of John William Stafford, was awarded his custody in a decree granting her a divorce from William Nathan Stafford. Afterwards the mother dies, and the circuit court of Coultrie county appointed an aunt of the child as the guardian of his property and person. On a hearing in the Circuit Court, the custody of the son was given the father and the aunt was appointed as guardian of the minor's property. The supreme court affirmed this judgment and in considering the contention that it was against the policy of the law of this state to permit the father to take his son to his home in Oklahoma out of the jurisdiction and control of this court, referred to the Miner case in the following language: "In the Miner case there was a question between the father and mother as to the custody of their child, and this court held that when the aid of the court is thus evoked it will not permit the one or the other to remove the child beyond its jurisdiction. The reason for the rule in that case was that the parties both had a natural right to the custody of the child, and neither would be allowed to entirely deprive the other of his or her parental right of seeing and visiting his child. In this case there is no reason for such a rule". We do not consider the Stafford case as sustaining appellee's position in the instant case where the question is between a mother and father and in fact that case seems to recognize the doctrine laid

15-2

down in the Miner case as the rule in this state. From a review of these cases, which are the principal, if not the only cases on this subject in this state, we are of the opinion that the weight of authority in this state is that as between the parents of a child, the custody of a child should not be awarded to either of ~~them~~ ^{parents} with the intention of removing the child to another state without the jurisdiction of the court. While the modified decree in this case provided that appellee shall be deemed in contempt of court if she should fail to return the child at the times stated, yet the circuit court of Marion county would have no way in which to enforce its mandate against ~~her~~, and to bring her into court to answer the contempt charges, if the child should be taken from this state as permitted by this decree.

We are of the opinion that it was error for the trial court to award appellee the custody of the child to be removed to Missouri, where both the mother and child would be beyond the jurisdiction of the court. The modified decree will be reversed and the cause remanded with directions to the court below to dismiss appellee's petition for a modification of the original decree.

Reversed and Remanded with directions.

Not to be reported

Term No.37.

Agenda No.12.

Appellate Court, Fourth District.

October Term, 1925.

RECEIVED
CLERK OF THE DISTRICT COURT
FOURTH DISTRICT
JAN 17 1926

E.L.DATON,

Appellant

v.

Appeal from MARION.

ILLINOIS CENTRAL RAILROAD

COMPANY,

Appellee.

241 I.A. 641

FILED

Opinion by Higbee, J.

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This is an action in assumpsit brought by E.L.Daton, appellant, against the Illinois Central Railroad Company, appellee, to recover one-half the cost of paving an alley or passage-way thirty feet wide, on the east and north sides of what is termed, Markham Park in the city of Centralia..

Markham Park is owned by appellee which also owns the alley or passageway on the east and north sides of this park, and at one time owned the property east and north of this alley-way, but in conveying this property it seems that appellee covenanted with the purchasers to keep it open for their use. It appears that L.R.Byrd representing the property owners on the east and north sides of this alley-way and F.T.Gibbs, who was appellee's trainmaster in Centralia, came to appellant and asked him to submit ~~to~~ a bid for paving this alley-way. In a few days he submitted a bid which Byrd submitted to the property owners, and ^{which} ~~it appears that~~ Gibbs was to submit ~~the same~~ to appellee. It also appears that later Byrd reported to appellant that his bid was satisfactory to the property owners and Gibbs reported that it was satisfactory to the railroad company. This seems to have been done with the understanding that the property owners were to pay one-half and

appellee one-half of the bill. The work was done and one-half of the amount of the bid was paid by the property owners. Appellee refused to pay the other half upon the ground that its trainmaster, Gibbs, had no authority to recover the same. *to represent it and this suit followed* Upon the trial the court refused to admit evidence of the conversation between Appellant and Appellee's trainmaster and later, on motion of appellee gave a peremptory instruction to the jury to return a verdict for appellee.

The controlling question in this case is concerning the admissibility of the conversation or agreement between appellant and appellee's trainmaster. Counsel for appellant state in their argument that it is conceded appellee's trainmaster did not, by virtue of his position as trainmaster, have the authority to make the contract in question between appellant and appellee. It is however contended ^{then} by ~~appellee~~ ^{appellant} that while the trainmaster did not by virtue of his position have authority to make the contract he did have the authority to submit appellant's bid to appellee and to report to appellant, appellee's acceptance or rejection. *It* is well settled in this state that an agency cannot be proved by the declaration of an alleged agent when the fact of the agency is in issue. (Proctor v. Tows, 115 Ill. 138). It ~~is~~ necessarily follows that until the fact of a disputed agency is established, the declarations of the alleged agent is not admissible against his principal. Therefore, unless the agency of the trainmaster had been otherwise established his declarations and conversation were not admissible against appellee and the court committed no error in excluding this testimony. While conceding that the making of the contract in question was not within ⁱⁿ ~~the~~ the apparent scope of the trainmaster's employment, counsel for appellant contend that his authority for submitting the bid and reporting appellee's action thereon is shown by two facts in evidence. The first is that the testimony showed the trainmaster was the "ranking official"

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of appellee in Centralia, and that it was within the actual or apparent scope of his authority to submit the bid and report appellee's reply. The proof, however, failed to show that the trainmaster, by virtue of his position as "ranking official" had actual authority to conduct negotiations such as those here involved, for appellee, and we are unable to hold that it was within the apparent scope of the authority of appellee's trainmaster, simply because he was the "ranking official" of appellant in Centralia, ~~to carry on these negotiations in a matter which was not within the actual scope of his duties as trainmaster.~~

The other fact shown by the proof which appellant contends establishes the trainmaster's authority in this case, is that arising from the testimony of certain witnesses who stated that other matters which were not within the scope of the trainmaster's employment had in the past been taken up by citizens of Centralia with appellee through its trainmaster. Even if it should be conceded that the evidence in this case shows that other parties had acted with appellee through its trainmaster as its official channel, before appellee could be entitled to rely upon this fact, he must show that at the time of the transaction he knew of such acts or other acts which amounted to a holding out of the trainmaster by appellant as its agent. The doctrine is well established in this state that while a principal may be bound to the extent of the apparent authority which he has conferred upon his agent by holding out the agent to the public as possessing the power which the agent exercises, yet it must be shown that the acts which amount to such representation of the agent's authority were known to the party setting them up if he intends to avail himself of them. (Alton Mfg. Co. v. Biblical Institute, 243 Ill. 298.) It was held by our Supreme Court in Merchants National Bank v. Nichols & Shepard Co., 223 Ill. 41 that "a party dealing with an

112-4

agent must prove that the facts giving color to the agency were known to him when he dealt with the agent. If he has no knowledge of such facts he does not act in reliance upon them and is in no position to claim anything on account of them." The record in this case is barren of any evidence to show that at the time of the conversations in question here appellant had any knowledge of the different transactions taken up with appellee through its trainmaster by other people in Centralia, and we must therefore hold that the trainmaster's authority to submit appellant's bid and report to him appellee's action thereon was not established by the evidence in this case. Since, therefore, the trainmaster's authority to act in this respect was not within the actual or apparent scope of his employment, and was not shown by other evidence that appellee could be bound by, ~~any statements or agreements he may have made to or with appellant,~~ evidence of such statements or agreements were not competent ~~as against appellee and the court therefore committed~~ *in the present case* no error in excluding testimony concerning the same.

There being no evidence then to establish a contract with appellee the court properly instructed the jury to return a verdict for appellee and the judgment based thereon should be and is affirmed.

Affirmed.

not to be rep.

112 March 2, 1924
Upper Lake 2 - 100
P. H. H. 1
Named March 3, 1924

Term No. 43

576 Va

Appellate Court
Fourth District
October Term, A. D. 1925.

Agenda No. 27
FEB 17 1926
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT ILLINOIS

Independent Plumbing & Heating
Supply Company, a Corporation,
Appellee

vs.

Edward C. Zulley, et. al.
Appellants.

241 T. A. 642

APPEAL FROM ST. CLAIR COUNTY.

OPINION BY HIGBEE, J.

This is a suit brought by Independent Plumbing and Heating Supply Company, appellee, to foreclose a mechanic's lien against the residence property in St. Clair County, Illinois, of Edward C. Zulley and Dolores Zulley, appellants, for the materials and labor in the installation of a hot water heating system. Appellants filed a joint answer admitting they were the owners and in possession of the real estate described in the bill and alleging that appellee was a corporation incorporated and doing business under the laws of the state of Missouri, and at the time of the furnishing of the materials and installing of the heating system had not complied with the requirements of the statute of the State of Illinois, permitting it to carry on its business in this state. The answer denied the making of the contract for the materials and labor, and also denied the performance of the labor and delivery of materials. Appellee fraudulently misrepresented the heating system and guaranteed that it would maintain a temperature of seventy-five degrees in all the rooms in the building when the temperature outdoors was ten degrees below zero. It alleged that appellee advised appellants the cost of installing the plant would be about \$75.00 and not to exceed \$90.00 at the most, and that the cost of the materials would not exceed the sum of \$400.00; that appellants advised appellee it would

FEB 17 1925
 U.S. DISTRICT COURT
 SOUTHERN DISTRICT
 OF ILLINOIS
 CHICAGO

Appellate Court

Fourth District

October Term, A. D. 1925.

648
 648

APPEAL FROM ST. CLAIR COUNTY.

Plaintiff Plumbing & Heating
 Company, a Corporation,
 Appellee

vs.
 Appellants.

OPINION BY HIGGINS, J.

This is an appeal from a judgment of the Circuit Court of St. Clair County, Illinois, entered on the 12th day of December, 1924, in favor of the plaintiff, Plumbing & Heating Company, a corporation, and against the defendants, John A. Higgins and John A. Higgins, Jr. The plaintiff claims that the defendants are liable to it for the cost of materials and labor in the installation of a heating system in the premises owned by the plaintiff. The defendants claim that the plaintiff is not entitled to recover for the cost of materials and labor in the installation of a heating system in the premises owned by the plaintiff. The plaintiff claims that the defendants are liable to it for the cost of materials and labor in the installation of a heating system in the premises owned by the plaintiff. The defendants claim that the plaintiff is not entitled to recover for the cost of materials and labor in the installation of a heating system in the premises owned by the plaintiff.

be necessary that the installation should be completed and ready for use not later than the 25th day of November, 1925, and that appellee agreed to complete the same by that time. The answer then alleged that complainant did not commence the work or deliver any material until sometime in December, 1922, and that appellees were compelled as a consequence thereof to live in hotels in St. Louis, Missouri, and to pay out for hotel bills, storing furniture, etc., the sum of \$350.00, and denied that the plant would maintain a temperature of seventy-five degrees when the temperature was ten degrees below zero. The answer further alleged that the plant was installed by licensed plumbers or steam fitters in direct violation of the city ordinance of East St. Louis, and that the same was improperly installed and because of such improper installation appellee's floors and pipes of their water system already installed were greatly damaged, and for each of such items of damage claimed a set off or recoupment against appellee to an amount in excess of \$500.00 in addition to the hotel and storage bill of \$350.00. The cause was referred to the Master in Chancery for his report of evidence and conclusions. The Master found that appellee was entitled to a foreclosure of its lien in the sum of \$614.05. This report of the Master in Chancery was approved by the Court and a decree entered for the sum therein recommended, and from that decree this appeal was perfected.

The first ground upon which a reversal of this decree is asked in appellant's argument is the court's refusal to allow the items of recoupment or set-off^{set} up in their answer. The evidence as to whether or not appellants were damaged in the different respects claimed by them and as to the extent of such damages is somewhat conflicting, but from an examination of the same, we are satisfied that the proof on this question sustains the conclusion reached by the Master in Chancery and the decree of the Court below in not allowing appellant's claim therefor.

It is urged that the evidence shows that appellant, Dolores C. Zulley was not a party to the contract, took no part in the transaction, had no knowledge thereof, and did not authorize anyone to act in her behalf or to

...that the installation should be completed and ready for use
...the 25th day of November, 1932, and that appellee agreed

...the same by that time. The answer then alleged that

...the work or deliver any material until

...December, 1932, and that appellee were compelled as a consequence

...to live in hotels in St. Louis, Missouri, and to pay out

...the sum of \$350.00, and denied

...the plant would maintain a temperature of seventy-five degrees when

...the temperature was ten degrees below zero. The answer further alleged

...the plant was installed by licensed plumbers of steam fitters in

...the ordinance of the city ordinance of East St. Louis, and that the

...because of such improper installation

...and that of

...each of

...the appellee to an amount in excess of \$500.00 in addition

...The cause was referred to

...for his report of evidence and conclusions. The

...was entitled to a foreclosing of the lien in

...

...entered for the sum therein recommended; and from

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...

...

...could a refusal to allow the items of recovery

...The evidence as to whether or not

...

...but from an estimate

...that the roof on this question entailing

...

...

...that appellee, before C. Wiley

...in the transaction, had no

...to act in her behalf or to

bind her by any contract with appellee; that therefore, there is a variance between the proof and the bill of complaint which alleges merely that appellants were the owners of the premises in question, and that appellee entered into the contract with both of them. It appears from the proof that appellants are husband and wife and their answer admits they are the owners and in possession of the premises in question, which were improved with buildings for residence purposes, which defendants were at the time in question remodeling, installing hard wood floors and various plumbing fixtures. Section 3 of the Mechanic's Lien Act provides that if the title to lands upon which improvements are made is held jointly by the husband and wife the lien given by the Act shall attach to such lands and improvements, if the improvements are made in pursuance of a contract with both of them or in pursuance of a contract with either of them, and in all such cases no claim or homestead right set up by a husband or wife shall defeat the lien given by the act. Under this statute the lien would attach to the premises owned jointly by appellants even though the contract was made only with the husband.

It is further claimed, ^{by} appellants that appellee being a non-resident corporation and not having complied with the requirements of the statute of this state for the transaction of business therein, cannot maintain this suit under our statute. The evidence shows that ~~no~~ appellee has no office or place of business within the state of Illinois; that its office and principal place of business is in the city of St. Louis, Missouri, and that the contract in this case was entered into in St. Louis. It is true that the claim for mechanic's lien includes the cost of installing the heating plant. However the record clearly shows that appellee submitted only an estimate of the cost of the materials, not including costs of installation, and that appellees accepted the same and made a payment of \$50.00 thereon. Appellant contends that the contract included cost of installation. Appellee contests this claim and its manager-treasurer testified that at appellant's request a workman was secured to install the plant, and later at appellants' request appellee paid him. The estimate submitted by appellee and appellant's letter of acceptance thereof tends

and by any contract with appellee; that therefore, there is a variance

between the proof and the bill of complaint which alleges merely that

appellee were the owners of the premises in question, and that appellee

passed into the contract with both or them. It appears from the proof

that appellee's wife and her answer admits they are the

contract was made

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to corroborate appellant in this matter, and the trial court was warranted under this proof in finding appellee was not doing business in this state so as to require a certificate from the secretary of State. That question has been before our supreme Court several times, and it has been held, that entering into one contract or transacting an isolated business act or the selling of goods by a foreign corporation to be delivered in this state is not transacting business in this state within the purview of our Statute requiring a certificate from the Secretary of State. (Alpena Portland Cement Co. vs. Jenkins and Reynolds Co. 244 Ill. 264; American Art Works v. Picture Frame Works 264 id. 610 Flew v. Board 274 id 232.) ~~Moreover appellants by pleading set off or recoupment in their answer recognized appellant's right to maintain this action.~~

Appellants introduced in evidence a certified copy of an ordinance of East St. Louis requiring all plumbers to obtain license, under the Statute of June 29, 1917. The proof shows that the workman who installed this plant did not hold such plumber's license and appellants contend that appellee under this proof cannot maintain this suit for such services. The certified copy of the ordinance introduced in evidence contains no date as to its enactment. The certificate of the clerk thereto is dated November 3, 1924 about two years after the plant was installed. Appellee insists that one who installs a hot water heating system is not a plumber within the meaning of either the Statute or the ordinance. However that may be, while the Statute and the ordinance both provide that one who engages in the work of plumbing without obtaining such a license shall be guilty of a misdemeanor, yet they do not prohibit him from recovering for work done. ~~Again appellants by pleading set off or recoupment for the alleged negligence and unskillful installation of the plant acknowledged and recognized appellee's right to maintain this action in this respect also.~~

The record in this case does not disclose any sufficient reason for disturbing the decree herein and the same will therefore be affirmed.

DECREE AFFIRMED.

Not to be reported

corporation appearing in this matter, and the trial court was warranted
in this proof in finding appellee was not doing business in this state
as to require a certificate from the secretary or state. That position
has been before our Supreme Court several times, and it has been held,
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the selling of goods by a foreign corporation to be delivered in this
state is not transacting business in this state. Within the purview of the
state requiring a certificate from the secretary of state.
Portland Cement Co. vs. Jenkins and Reynolds Co., 111. 354;
can it Works v. Picture Trans Works 264 id.

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The proof shows that the workman who installed his
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the statute and the ordinance both provide that one who
work of plumbing without obtaining such a license shall be
yet they do not prohibit him from recovering for

Term No.49.

Agenda No.11.

Appellate Court.

Fourth District.

October Term,1925.

J O H N H U T H,)

Appellee)

v.) Appeal from FRANKLIN.

O L A N K I N G, et al)

Appellants.)

FILED
FEB 17 1925
P. M.
CLERK OF COURT
1925

241 LA. 642

Opinion by Higbee, J.

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Appellee, John Huth, filed his declaration to the say Term,

1924, of the Franklin Circuit Court, against Olan King, W.W. King and
by You, for Appellants Partners, doing business under
the firm name of King Meat Company.

which
The declaration consists of one count, charges that on
January 1, 1924, appellee was, and for a long time prior had been,
the owner of certain real estate occupied by him and his family as
their homestead; that prior to that time appellants had con-
structed buildings upon lands adjacent to and adjoining the
property of appellee used for the purpose of slaughtering animals
for sale for food; that appellants so carelessly and negligently
conducted their business that offensive and obnoxious odors and
smells emanated therefrom and prevented appellee and his family
from enjoying the peace and quiet of their home, and impaired the
health of appellee and his family and damaged his property.
Appellants filed the general issue to this declaration. Upon a
trial before a jury a verdict was returned in favor of appellee
in the sum of \$700.00. After overruling the motion for new trial
the court entered a verdict on this judgment and this appeal has
followed.

The evidence shows that since 1917 appellee owned a

tract of about 34 acres of land, a short distance south of West Frankford, Illinois, and that the same was improved by a dwelling house and other buildings and occupied by appellee as his homestead. The evidence further shows that in 1922 appellants purchased a tract of eight acres of land joining appellee's premises and erected and operated a slaughterhouse about 690 feet south east of appellee's residence.

No instructions were offered by or given in behalf of appellee and all the instructions offered by appellants were given. No objection is made as to the trial court's rulings on the admissibility of evidence. The only grounds urged for reversal of this judgment is that the evidence does not support the verdict. Numerous witnesses were placed upon the stand by both parties. In addition to himself appellee placed 15 witnesses upon the stand all of whom testified that there were more or less obnoxious odors from the plant. Some of them testified that the odors were so offensive as to cause vomiting. On the other hand appellants in addition to two members of the firm and their employes placed nineteen witnesses on the stand, some of whom were health officers, and all of whom testified that there were no obnoxious odors from the plant. It seems to us that it would serve no good purpose to enter into a detailed discussion of the testimony of these different witnesses. The evidence of either party standing alone would support the verdict in favor of that party. The jury heard the witnesses testify and observed their demeanor upon the witness stand. The court, who also had the same opportunity to hear and observe the witnesses, overruled the motion for new trial. Both the jury and the trial judge were in better position to judge the credibility of the witnesses than is the court. They have determined that the evidence preponderates in favor of appellee, and this court is not in position to warrant it in holding that the verdict is contrary to the manifest weight of the evidence. There being no errors in the trial of the case, suggested, the judgment must be affirmed.

Not to be taken
AFFIRMED.

#50

Station for Recovery Feb 5-1924

Named Feb 31-1926

Appellate Court, Fourth District.

October Term, 1925.

MARTIN SCHNIPPER, Sheriff for the)
 use of R.H. HUSCHLE,)
 Appellee)

v.

Appeal from ST. CLAIR CO. (D)

C.F. ROBINSON and WEBER IMPLEMENT &)
 AUTOMOBILE CO., a Corporation,)
 Appellant.)

241 I.A. 642

Opinion by Higbee, J.

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This was a suit brought by Martin Schnipper, sheriff of St. Clair county, appellee, for the use of R.H. Huschle against C.F. Robinson and Weber Implement & Automobile Co., a corporation, appellant, upon a replevin bond for the sum of sixteen hundred dollars, executed on September 30, 1921 by said C.F. Robinson, as principal and Weber Implement & Automobile Co. as surety to said sheriff.

The bond stated that said Robinson had commenced an action of replevin against said Huschle and others for a certain automobile and contained the usual provision for keeping the sheriff harmless in replevying said property. This suit resulted in a verdict and judgment in favor of appellee and against appellants for Eleven Hundred Dollars. The case was brought to this court by appeal at the March term, 1925 and a record containing a purported bill of exceptions was filed March 4, 1925. Afterwards, at that term, appellee filed a suggestion of diminution of the record and entered a motion for a certiorari to bring up the complete record of the trial court, which was allowed. Subsequently, on November 3, 1925, the complete record was filed in this court. From this record it appears that while the bill of exceptions bears the indorsement "Presented to me this 17th day of January, A.D. 1925" which was signed

by the trial judge, yet as a matter of fact the bill of exceptions as such was in fact never signed by said judge. The usual and proper certificate prepared for the signature of the judge is attached to the bill of exceptions but the space intended for the date is not filled in and ^{the} place prepared for the signature of the judge is vacant.

Without a bill of exceptions there is nothing for this court to consider but the common law record, ^{Bowles} ~~Bacon~~ v. Lambka, 57 Ill.App.334) and as no ~~record~~ errors are assigned or argued by appellants relating to that record and none appear evident to this court, the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported

FILED

FEB 17 1925

Robert B. Rice
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Term No. 51.

Agenda No. 9.

Appellate Court, Fourth District.

October Term, 1925.

ROBBIE M. SMITH,

Appellant.)

v.)

Appeal from PCPE.

MAUDE ROBBS and CLAUDE ROBBS,)

Appellees.)

241 I.A. 642

Opinion by Higbee, J.

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This is an appeal by Robbie M. Smith, appellant, from a decree of the circuit court dismissing a bill brought by her to reform a certain contract theretofore entered into between Maude Robbs, appellee and Claude Robbs her husband, and to enjoin said appellee, Maude Robbs, from prosecuting a suit brought by her against appellant for the alienation of the affections of said appellee's husband.

The answer of defendant, Claude Robbs admitted the allegations of the bill but defendant Maude Robbs answered denying them.

It appears that prior to December, 1918, said Maude Robbs, who will hereinafter be designated as appellee, and her husband, Claude Robbs were living on eighty acres of land owned by her father, Floyd Robbs near Galconda, Illinois. At that time appellant lived in Golconda, and was engaged in the loan and insurance business, and also owned some farms, one of which adjoined the farm upon which appellee lived. Appellee and her husband applied to appellant to secure for them a loan upon the land they were purchasing from appellee's father. Appellant secured a loan for them in the sum of \$4000.00 and appellee's father conveyed the land to them. Soon after this transaction appellant employed

appellee's husband to assist her in her business. Later domestic troubles arose between appellee and her husband, which culminated in the filing of a suit for separate maintenance by appellee against her husband Claude Robbs. Before this suit was tried it seems that rumors were current in the vicinity where the parties lived, that appellee intended to file a suit against appellant for alienation of the affections of her husband.

Negotiations were opened between appellee and her husband, Claude Robbs for settlement of their property rights. In these negotiations appellee's father Floyd Robbs took an active part.

In her suit for separate maintenance and the negotiations for property settlement appellee was represented by her attorney Charles Durfee and her husband by his attorney, Clarence O'Connell. Appellant and Claude Robbs it appears desired that this settlement should include a release by appellee of all claims and demands against appellant ~~from~~ the alleged alienation of ^{the} affection of appellee's husband by appellant. Appellant at this time was represented by Noah Gullett as her attorney.

A property settlement was reached between appellee and her husband and her suit for separate maintenance was changed to one for divorce. In the settlement the eighty acres of land purchased by appellee and her husband from her father was conveyed to appellant subject to the \$4000 mortgage, upon the payment of \$1000 to appellee and \$1000 to her husband, Claude Robbs which he in turn paid to appellee. The written contract which evidenced this settlement did not mention appellant by name, but contained this provision, "It is further understood and agreed that this agreement is a settlement in full of all property rights, claims and demands of all kinds now or hereafter or suits brought in which either party is the subject of the litigation between Claude Robbs and Maude Robbs." Appellant contends that it was the understanding of all parties that her payment of \$2000 for this 80 acres of land was to be in satisfaction of any claim.

of appellee against her for alienation of her husband's affections, and that such was the purpose of the above quoted clause of the agreement of settlement, but that her name was purposely omitted therefrom in order to avoid publicity. Appellant on the other hand contends that the settlement did not include any release of appellant. In the negotiations leading up to the settlement a number of written contracts were drawn by the different parties interested or their attorneys. It is quite clear that Claude Robbs and his attorney, and appellant and her attorney understood that such settlement was to be a release of appellant. It is also quite clear that appellee's attorney in the beginning of these negotiations also understood that appellant and Claude Robb believed that whatever settlement should be reached was to operate as a release of appellant. It appears that her attorney for Claude Robbs submitted a proposed written agreement which did not satisfy appellee's attorney, and from it ~~that~~ information ~~was~~ drawn that during the negotiations a written contract was prepared either for appellant or for Claude Robbs which was satisfactory to them in which appellant was expressly released from all liability for the alienation of the affections of appellee's husband. The evidence does not disclose however that this contract was submitted to appellee or her attorney. The contract sought to be reformed was finally prepared and submitted to appellee and when her attorney advised her that this contract would not bar her from suing appellant for alienation of the affections of her husband, she then consented to and did sign the contract and appellant issued a check to appellee for \$1000 and one to Claude Robb for \$1000 which he endorsed and delivered to appellee. From all the evidence it is not established that appellee ever intended to agree or did agree either orally or in writing that she would not bring suit against appellant for alienation of her husband's

affections.. Neither does the evidence show that there was any consideration for such an agreement upon her part.

There is no question, but that one purpose of the agreement was to release Claude Hobbs from any liability for the care and support of appellee and their two minor children. The only evidence there is in the record as to the value of the land tends to show that it was worth all appellant paid for it. From all the proof in the record, we conclude that the chancellor did not err in dismissing the bill and the decree is therefore affirmed.

. Sffirmed.

not to be reported

IN THE

Appellate Court of Illinois

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1925.

THE PEOPLE OF THE STATE OF
ILLINOIS,*Defendant in Error,*
VS.JAKE BECKERMAN AND ISADORE
BECKERMAN,*Plaintiffs in Error.**Error to the City Court
of Granite City, Illi-
nois.*

OPINION BY BOGGS, P. J.

Plaintiffs in error, with one Dora Beckerman, were indicted at the March term, 1924, of the city court of Granite City. The indictment consisted of three counts, the first and second of which charged that plaintiffs in error did unlawfully burn certain goods which were insured against loss by fire, etc. The third count charged that plaintiffs in error did conspire and agree, with the fraudulent and malicious intent to burn and cause to be burned certain goods and merchandise, consisting of boots, shoes, etc., with intent to defraud the County Fire Insurance Company of Philadelphia, etc.

A trial was had, resulting in a verdict of guilty on said third count as to plaintiffs in error. A fine of \$1,000 was imposed against plaintiff in error, Jake Beckerman, and of \$200 against Isadore Beckerman. To reverse said judgment, this writ of error is prosecuted.

Plaintiff in error, Jake Beckerman, with his son Isadore, resided in East St. Louis, and conducted a retail shoe store under the name of D. Beckerman, in Granite City, in a building owned by one M. Vouduras. The trip to and from the place of business was made by plaintiffs

in error daily in an automobile, the trip taking from twenty to thirty minutes. The evidence tends to show that Jake Beckerman was the sole owner of said business, and that his son, who was then about seventeen years of age, assisted him in and about the selling of goods, drawing checks, keeping of the books, etc.

About 6:30 on the evening of April 15th, 1924, a fire was discovered in said building, but was extinguished by the fire department and others assisting, before it had burned to any considerable extent. The evidence offered on the part of the People tended to show that shortly prior to said fire, Jake Beckerman had taken out some \$14,000 of insurance on said stock of goods and fixtures, while the same were worth not to exceed \$7,000 or \$8,000. The evidence was further to the effect that a large pile of empty boxes was found in said building, together with three or four rubber boots practically filled with oil and gasoline; that there was oil on the floor in and around said pile of empty boxes, and matches were found under said boxes; that on the evening in question plaintiffs in error were seen near said building some fifteen or twenty minutes after six o'clock, and shortly thereafter said fire was discovered; that Isadore Beckerman had left said building prior to Jake Beckerman, and that before Jake Beckerman had left the same, one Tony Michel, a witness for the People, stepped into the front of said store room to call for some shoes he had left to be repaired. Said witness testified: "There was no one in the front part of the store when I went in. I waited for some time and was about to leave when Jake Beckerman came out from behind the partition. His sleeves were rolled up and he seemed to be perspiring, as if he had been working. I asked him for my shoes and he said I could get them the next day at his other store. Then I left the store and went home. Jake Beckerman was at the door when I left and then he went back in the store.



I didn't see the fire." He further testified that this was at about 6:15.

On the other hand, the evidence on the part of plaintiffs in error is to the effect that said stock of goods was worth some \$11,000, and the fixtures were worth from \$3,000 to \$3,500; that the business was owned by Jacob Beckerman; that neither his wife, Dora Beckerman, nor his son, Isadore Beckerman, had any property in said business, and that Dora Beckerman was never around there, and had no connection therewith, and that Isadore had no connection therewith except to assist as above stated.

It is the contention of plaintiffs in error that the evidence wholly fails to sustain the charge of conspiracy; that even though the record was sufficient to disclose that Jake Beckerman may have set fire to said building, there is no sufficient evidence to the effect that he and Isadore Beckerman either conspired together or conspired with a third person or persons to burn said stock of goods for the purpose of defrauding said insurance companies; that so far as the record is concerned, there is no evidence even fairly tending to prove an agreeing or conspiring together for such purpose.

To authorize a conviction for conspiracy, there must be proved to have been more than one person guilty. *Evans v. People*, 90 Ill., 384-389; 2 Wharton Crim. Law, 7th Ed., Sec. 2339; 2 Russell on Crimes, 7th Ed., Sec. 674; *People v. Madden*, 313 Ill., 277-285; 5 R. C. L., p. 1065, Sec. 5. There must be something more than proof of a mere passive cognizance of fraudulent or illegal action of others to sustain conspiracy. There must be something showing an active participation of some kind by the parties charged. *Evans v. People*, *supra*, 390; 2 Wharton's Crim. Law, Sec. 2355; *People v. Madden*, *supra*, 285; 5 R. C. L., p. 1065, Sec. 5, *supra*.

The question for our determination is not whether plaintiffs in error are guilty of some crime or offense, but whether they are guilty of a conspiracy as charged in the third count of the indictment. "It is not sufficient to sustain a conviction of a particular charge to prove that the defendant is guilty of some other charge, or of generally bad and criminal conduct, but the proof must establish the guilt of the particular charge in the indictment." *People v. Madder, supra*, 283; *Lowell v. People*, 229 Ill., 227.

A careful examination of the evidence in the record wholly fails to sustain the charge of a conspiracy on the part of plaintiffs in error, either between themselves or with a third person. So far as the record discloses, there was nothing said or done between plaintiffs in error or by plaintiffs in error with any third person, looking toward the destruction of said property by fire. We would therefore not be warranted in holding that the crime of conspiracy had been proven as laid in the indictment.

In view of what we have said, it will not be necessary for us to discuss the other assignments of error.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reverse and remanded.

Not to be reported.

Term No. 6.

Agenda No. 7.

IN THE
Appellate Court of Illinois

FOURTH DISTRICT.

MARCH TERM, A. D. 1926.

THE NATIONAL STATE BANK OF
METROPOLIS, A CORPORATION,

Appellee,

vs.

O. W. LYERLA AND JOHN
MARLOW,

Appellants.

*Appeal from the
Massac County Cir-
cuit Court.*

241 I.A. 643

OPINION BY BOGGS, P. J.

On October 28th, 1924, in vacation after the August Term, 1924, of the Circuit Court of Massac County, a judgment was entered by confession on a promissory note executed by appellants. On November 18th, 1924, appellants filed their motion to vacate and set aside said judgment, and for leave to plead. Said motion was afterward amended, and was not finally disposed of until December 4th, 1925, when the court denied the same. Thereupon appellants prosecuted this appeal.

It is first contended by appellants that the court erred in permitting appellee to file its counter-affidavit to said motion, on the ground that said affidavit goes to the merits of the case.

Counter affidavits going to the merits cannot be considered by the court on a motion to open a judgment by confession and for leave to plead. *Mendel v. Kimball*, 85 Ill., 582; *Gilchrist Transportation Co. v. Northern Grain Co.*, 204 Ill., 510-512; *Hood v. Gehrs*, 170 App., 250-252; *Stone v. Levinson*, 228 App., 342; *Mutual Life of Illinois v. Little*, 228 App., 436-439. An examination



of said counter affidavit filed by appellee will disclose that the same did in effect go to the merits of appellee's right to recover. Said counter affidavit is therefore not to be considered in passing on said motion.

The question then arising on this record is as to whether the amended affidavit filed by appellants in support of their motion was sufficient. Said affidavit, among other things, alleged that on or about January 1st, 1923, one Samuel Solomon was indebted to appellee bank in the sum of \$10,000 for borrowed money; that to secure the same, Solomon had executed a chattel mortgage on certain railroad cars, wagons and other personal property used in the operation of a street carnival; that about said date Solomon, being hopelessly insolvent, one Charles C. Leonard, a director, and one Charles S. Rose, a stockholder in appellee bank, "acting for and on behalf of the said plaintiff bank, * * * represented to defendants (appellants) that the property above mentioned was well worth the sum of \$50,000 and upwards after all indebtedness against said property was paid;" that said Leonard and Rose further proposed to appellants that appellee bank foreclose said mortgage, bid in said property, and then convey the same by bill of sale to appellants, provided appellants would execute their promissory note for \$10,000 to appellee bank. That it was further represented that appellee bank would "carry said note and renew the same from time to time until these defendants could either sell the chattel property above mentioned and pay the note, or in case these defendants desired to operate the property above mentioned, then and in such case said plaintiff bank would carry said note of these defendants, and renew the same from time to time, until these defendants could pay the same from the profits earned out of the operation of said property." That appellants, believing said statements made by Leonard and Rose, executed to appellee

bank their note for \$10,000; that thereafter appellee bank foreclosed said mortgage and executed a bill of sale for said property to appellants; that appellants took possession of said property, and afterward appellants paid the sum of \$2,500 on said \$10,000 note, and made a new note to appellee bank for \$7,500; that said last mentioned note is the one upon which judgment was taken as above set forth; that afterward appellants attempted to sell said property, and attempted to operate the same, "but without profit of any kind whatsoever; that there were numerous liens against the property, contrary to the representations made by the said Charles C. Leonard and Charles S. Rose on behalf of said plaintiff bank, and that these lien-holders took charge of and sold said property, and these defendants sold the remainder of said property at public sale, and with a complete loss to these defendants for court costs, attorneys' fees, storage claims and other liens, of more than \$10,000." That the representations made by Leonard and Rose to appellants as to the value of said property and as regarding the liens thereon, "were untrue, false and fraudulent, that the said property so owned by Sam Solomon as aforesaid was not worth the sum of \$2,000," and that Leonard and Rose knew at the time said statements were made that they were untrue, false and fraudulent, and that the same were made for the purpose of having appellants act upon the same. * * * "That these defendants did not learn or become informed of the facts above stated with regard to the value of the property above mentioned, and with regard to the liens thereon, until after the note upon which this suit is brought had been executed."

Appellants insist that on the consideration of this motion, the facts stated in their affidavit must be taken as true, and that if the same as stated are sufficient to make out a prima facie defense against the note in ques-

tion, that it was the duty of the court to vacate said judgment and give them leave to plead.

This is undoubtedly the law in this state. *McCormick v. Loomis*, 165 App., 214; *Stone v. Levinson*, *supra*. The question is, however, do the facts set forth in appellant's affidavit make out a prima facie defense to said note?

In this connection, it is first insisted by counsel for appellee that said affidavit fails to show by what authority Leonard and Rose purported to represent appellee bank. This point we think is well taken. The mere fact that Leonard was a director, and Rose a stockholder in said bank does not, in and of itself, show any authority on their part to represent said bank. The usual and customary business of a bank is carried on by its managing officers, as the president and cashier. Directors have no authority to act for a bank, except when they act as a board, or when they may be designated by a resolution of the board to so represent the bank.

Where one seeks to hold an alleged principal for the acts of an agent, the burden is upon him to allege in apt words and prove the agency, which may not be established by admissions or conversations of the alleged agent, but only by original, competent evidence. *Proctor v. Tows*, 115 Ill., 138-148; *Schmidt v. Shaver*, 196 Ill., 108-116; *Merchants National Bank v. Nichols & Co.*, 223 Ill., 41-49; *El Reno Grocery Co. v. Stocking*, 293 Ill., 494-502.

It is also contended by counsel for appellees against the sufficiency of said affidavit, that the statements of Leonard and Rose amounted to nothing more than expressions of opinion as to the value of said property, and that there is nothing in the affidavit to show that appellants had any right to rely on such statements, or that they were not in as good a position themselves to ascer-

tain with reference to the value of said property as were Leonard and Rose.

So far as the affidavit is concerned, Leonard and Rose did not own said property, and never owned it, and there is nothing to show that they had any special knowledge in reference thereto. If representations are as to a matter of opinion or a fact equally open to the inquiry of both parties, and in regard to which neither is presumed to trust or rely upon the other, it will furnish no basis for equitable interference on the ground of fraud. *Moore v. Recek*, 163 Ill., 17-21; *Zemple v. Hughes*, 235 Ill., 424-436; *Moyes v. Schendorf*, 238 Ill., 232; *Vanguard v. Steele*, 261 Ill., 206-215; *Bouxsein v. Grandville National Bank*, 292 Ill., 500-502; *Johnson v. Miller*, 299 Ill., 276-281. In *Moyes v. Schendorf*, *supra*, the court at page 235 says:

“The further contention is made that the contract, and the note given to secure compliance therewith, were procured by false and fraudulent representations. Schendorf states in his original affidavit that on or about August 25, 1906, as an inducement for him to buy the stock, appellee told him that his saloon and restaurant business was making money, and Schendorf swears that this statement was absolutely false and known to be false by appellee; that at that time the saloon and restaurant business was being run by the Goldstein Company at a loss of from \$35 to \$50 a day, and that said loss continued up to the time Schendorf gave up possession of said restaurant, about November 15, 1906. No details substantiating this statement were set forth in any of the affidavits, and we think it is apparent, as stated in the opinion of the Appellate Court, that Schendorf did not know as to this allegation of his own knowledge—that it was based on hearsay, unsupported by direct proof. The said allegation in Schendorf’s affidavit is the only proof offered in support of the fraud, and it is contradicted by other affidavits. But even though there was no controversy on this question, this general allegation, unsupported by any other proof, was insufficient to justify the Court in opening up the judgment with leave to plead.”

It will be observed from a reading of the affidavit, that no charge was made therein that Leonard and Rose undertook to state what liens there were against said property, the statement being "that the property above mentioned was well worth the sum of \$50,000 and upwards after all indebtedness against said property was paid." It is hardly likely that appellants would be greatly misled by a statement that property worth \$50,000 could be obtained for the sum of \$10,000. That, in and of itself, should have put them on notice, if they were not already advised with reference to the value of said property. It might also be observed that according to said affidavit, appellants took possession of said property, retained the same, paid \$2,500 on the note of \$10,000, and so far as the affidavit shows, made no complaint with reference to the value of the property until judgment was confessed in this case, being something like a year and ten months after the note for \$10,000 was given by appellants.

The affidavit in this case was wholly insufficient to warrant the court in granting the motion made by appellants to vacate said judgment and for leave to plead, and the trial court did not err in denying the same.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 29.

Agenda No. 10.

IN THE

241 I.A. 643

Appellate Court of Illinois

FOURTH DISTRICT.

MARCH TERM, A. D. 1926.

L. COHEN GROCERY COMPANY,

Apellee,

vs.

G. L. LIMERICK, WINNIE LIMERICK AND JOHN R. MICK,

Appellants.

Appeal from the Franklin County Circuit Court.

OPINION BY BOGGS, P. J.

An action in assumpsit was instituted by appellee in the Circuit Court of Franklin County, against appellants, doing business as The Limerick Cash Grocery Company, on a bill for groceries charged to have been sold to appellants as such grocery company. The declaration consisted of the common counts, with which was filed an affidavit of merits. To said declaration, a plea of the general issue was filed, with which was filed an affidavit of merits, sworn to by appellant G. L. Limerick. A trial was had, and at the close of appellants' evidence on motion of appellee the court directed a verdict in its favor for \$782.36, and judgment was rendered thereon. To reverse said judgment, appellants prosecute this appeal.

It is first contended by appellants for a reversal of said judgment: "There is nothing in the evidence showing the existence of a partnership, as to the Limerick Cash Grocery of Christopher, Illinois, and nothing showing that G. L. Limerick was a partner in the concern, either by his admission or by any act of his, from which the jury could infer that he was a partner in the business, nor is there any evidence, tending to establish the fact that he was jointly liable with the other defendants named in the suit."

The plea of the general issue was not sworn to, and there was no special plea filed by appellants denying joint liability, or that said defendants were doing business as a corporation. This being the state of the pleadings, neither the character nor capacity in which appellants were sued was in issue in the case. *McNulty v. Lockbridge*, 137 Ill., 270-286; *Chicago Union Traction Co. v. Gerka*, 227 Ill., 95-99; *Pennsylvania Co. v. Chapman*, 220 Ill., 428-430; *Wynn v. Cleveland, C. C. & St. L. R. Co.*, 143 App., 71-76, aff'd 239 Ill. 132.

Council for appellants practically concede that the law is as above stated, except that it is contended by them that where the declaration consists only of the common counts, in such character of case the rule does not apply. In support of this contention counsel cite: *Kinney v. Hall*, 68 Ill., 165; *Smith v. Knight*, 71 Ill., 148; *Walker v. Wood*, 170 Ill., 463-465; *Martin v. Trainer*, 125 App., 474; *Heidelmeier v. Hecht*, 145 App., 116.

In *Kinney v. Hall*, *supra*, the plea of the general issue was verified. In *Smith v. Knight*, *supra*, the plea of the general issue was filed, accompanied by an affidavit denying the alleged partnership and joint liability. In *Walker v. Wood*, *supra*, a sworn plea was filed by the defendant Cummings, denying joint liability. In *Martin v. Trainer*, and *Heidelmeier v. Hecht*, *supra*, the language of the court would seem to bear out the contention of appellants. However, the record in this case discloses that the plea of the general issue filed by appellants was filed by them as partners, doing business as the Limerick Cash Grocery Company, and the affidavit of merits filed with said plea was signed "Limerick Cash Grocery Co., by G. L. Limerick." So that appellants are not in a position to raise the question as to whether or not, as a general proposition, defendants sued as partners may, under an unverified plea of the general issue, offer evidence tending to prove that they were not partners.

It is next contended by appellants that the court erred in refusing to permit testimony on their part tending to show that no partnership in fact existed as to appellants. Under our holding as above set forth, the court did not err in this ruling.

It is next contended by appellants that the court erred in directing a verdict in favor of appellee at the close of all the evidence. The testimony offered on the part of appellee clearly supports the verdict and judgment, and there was no evidence offered on the part of appellants, fairly tending to prove that said claim was not just and owing. The court was therefore warranted, under that state of the record, in directing a verdict for appellee. *Evans v. Evans*, 163 App., 203; *Spear v. Hagerty*, 163 App., 27; *Davidson v. Zorger*, 181 App., 113; *Trueman Pioneer Stud Farm v. Baker*, 193 App., 598. The court did not err in directing a verdict in favor of appellee.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgement affirmed.

Not to be reported.

Term No. 59.

Agenda No. 31

IN THE

Appellate Court of Illinois

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1925.

THEODORE R. DUNN,
Appellee,

vs.

THEODORE A. KARR, JR., EXECU-
TOR OF THE LAST WILL AND
TESTAMENT OF THEODORE
KARR, SR., DECEASED; THEO-
DORE A. KARR, JR., CATHER-
INE L. YOCH, AMELIA REIS
AND LYDIA MILLER,

Appellants.

*Appeal from the Cir-
cuit Court of St. Clair
County.*

THEODORE A. KARR, JR., EXECU-
TOR OF THE LAST WILL AND
TESTAMENT OF THEODORE
KARR, SR., DECEASED; THEO-
DORE A. KARR, JR., CATHER-
INE L. YOCH, AMELIA REIS
AND LYDIA MILLER,

Appellants.

vs.

THEODORA R. DUNN, JAMES F.
DUNN AND LENA EDINGER,

Appellees.

OPINION BY BOGGS, P. J.

Appellee filed a bill in the Circuit Court of St. Clair County against Theodore A. Karr, Jr., executor of the last will and testament of Theodore Karr, Sr., deceased, and the heirs of said deceased, appellants herein, to have a certain mortgage for \$6,000 on premises owned by her, declared a forgery and a cloud on her title. Appellants filed an answer thereto, and a cross-bill, in both of which they admitted that said note and mortgage were forgeries, but allege in the cross-bill that they are entitled to a lien on said property for the amount of money which

Theodore Karr, Sr., the party defrauded by the forged note and mortgage, paid therefor.

Said cause was referred to the master in chancery to take the evidence and report the same, together with his conclusions of law and fact thereon. The master took the evidence and reported the same, recommending that the relief prayed in said cross-bill be granted, and that the original bill herein be dismissed for want of equity. On hearing on exceptions to the master's report, the court sustained the exceptions and entered a decree granting the relief prayed in the original bill, and dismissing said cross-bill for want of equity. To reverse said decree, this appeal is prosecuted.

The property in question, described as Lots Eleven (11) and Twelve (12) in Block Forty-two (42) of the platted town of East St. Louis, was owned by one Margaret E. Syarse during her lifetime. After her death it was sold at partition sale, to one Thomas Canavan for \$20,800. He paid \$7,000 in cash, and gave the master in chancery two notes, with a mortgage securing the same, for \$6,900 each. Before said notes became due, appellee bought said property from Canavan, subject to said mortgage of \$13,800, which appellee assumed and agreed to pay.

In October, 1921, about the time the notes were to become due, appellee borrowed through or from Henry T. Renshaw, a real estate and loan dealer, \$6,000, and executed to him a mortgage on said premises securing the same. Appellee gave her receipt to the master in chancery for her one-third interest of the amount which belonged to her as one of the heirs of her deceased mother, also her check to Henry T. Renshaw for \$2,200, also \$1,200 in cash, to satisfy said mortgage held by the master in chancery.

The mortgage executed by appellee bore date of October 5th, 1921, and was payable three years after date.

Said mortgage was filed for record on October 11th, 1921, and recorded in Book 576, on page 34, in the Recorder's office of St. Clair County.

On or about October 18th, 1921, Henry T. Renshaw sold and delivered the Dunn note and mortgage to Lena Edinger, she paying therefor by a check for \$1,500, and by turning over to Renshaw two notes and mortgages aggregating the sum of \$4,500, making a total of \$6,000.

In settling with the master in chancery, the evidence discloses that Renshaw executed his check for \$9,477.50, which, together with appellee's one-third interest in said premises, aggregated the amount of said mortgage indebtedness of \$13,800.00. A release of said mortgage was executed by the master, but the evidence tends to show that he was holding the same until payment should be made on said checks, etc. The \$9,477.50 was not paid, for lack of funds. Thereafter Renshaw executed two checks, each for \$4,738.75, aggregating \$9,477.50, and delivered them to the master. One of said checks was paid at once; the other was not paid, on account of lack of funds. Thereafter, the record discloses that Renshaw forged the name of appellee and her husband to a note and a mortgage for \$6,000, on the premises in question, payable to Theodore A. Karr, Trustee. This mortgage was sold to Karr through one William E. Siefert. Karr gave Siefert a check for \$5,990, dated November 3, 1921, and on the same date a check was made by Siefert to J. W. Renshaw Sons for \$5,930, and the forged note and mortgage were delivered to Karr. The evidence shows that the difference in the amount of the checks was on account of commissions that were allowed to Siefert. About the time this transaction was closed, Renshaw stated to the master that he could turn in the remaining check for \$4,738.75, as there were funds in the bank to pay the same. Renshaw testified that the funds derived from



the mortgage sold to Karr were the funds that he referred to when he told the master there were funds to pay this check. Theodore Karr thereafter died, and appellant Theodore A. Karr, Jr., is the executor of his estate.

It is the contention of said executor that while said note and mortgage purchased by Karr were forgeries, the funds derived therefrom went to pay said check of \$4,738.75, and that therefore it was a payment for the benefit of appellee, and that appellant as such executor should be to that extent subrogated to the rights of the holder of said mortgage of \$13,800, and be given a prior lien to that extent on said premises. This contention is based on the alleged reason that appellee had procured Renshaw to obtain for her funds with which to pay off the mortgage of \$13,800, and that in selling said forged note and mortgage through Seifert to Karr, he was obtaining money as her agent, with which to complete such payment.

On the other hand, appellee contends that Renshaw was not her agent, that she had funds sufficient to pay off said mortgage, other than the \$6,000 which she borrowed from Renshaw, and that she had placed in Renshaw's hands sufficient funds with which to satisfy said mortgage indebtedness, after surrendering the receipt for her interest in said funds to the master.

The doctrine of subrogation will be applied, or not, according to the dictates of equity and good conscience, and considerations of public policy. 25 R. C. L., Sec. 2, p. 1313. Its operation is controlled and governed by the principles of equity, and it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. 25 R. C. L., Sec. 4, p. 1314; 37 Cyc., 372. Subrogating is the creature of equity and will not be permitted where it will work in-



justice to those having equal or superior equities, or where it will operate to defeat a legal right. 25 R. C. L., Sec. 9, p. 1321; *Junker v. Rush*, 136 Ill., 179-183; *Makeel v. Hotchkiss*, 190 Ill., 311-319; *Schmitt v. Henneberry*, 48 App., 322-326; *Garey v. Trude*, 218 App., 372-374. Subrogation not being a matter of strict right, but purely equitable in its nature, dependent upon the facts and circumstances of each particular case, no general rule can be laid down which will afford a test in all cases for its application. 25 R. C. L., Sec. 10, p. 1323. While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer who, without any duty, moral or otherwise, pays the debt of another. 25 R. C. L., Sec. 11, p. 1324; *Powell v. Allen*, 11 App., 129-135. Such a person can establish no equity, and can obtain the right of substitution by contract only.

It will be observed from an examination of the record in this case, that appellant, Karr, does not bring himself within the rules above set forth. The record discloses that there was no relationship whatever between appellee and Theodore Karr, Sr., either contractual or otherwise. The record conclusively shows that neither Karr nor anyone for him paid the mortgage in question, or any part of it. The mere fact that the money which Karr paid for the forged note and mortgage may have been deposited by Renshaw in the bank to his credit, and that a check which he had previously given may have been paid from said funds, does not constitute a contractual relationship between Karr and appellee, neither does it show that Karr was attempting to pay off said mortgage in order to protect himself.

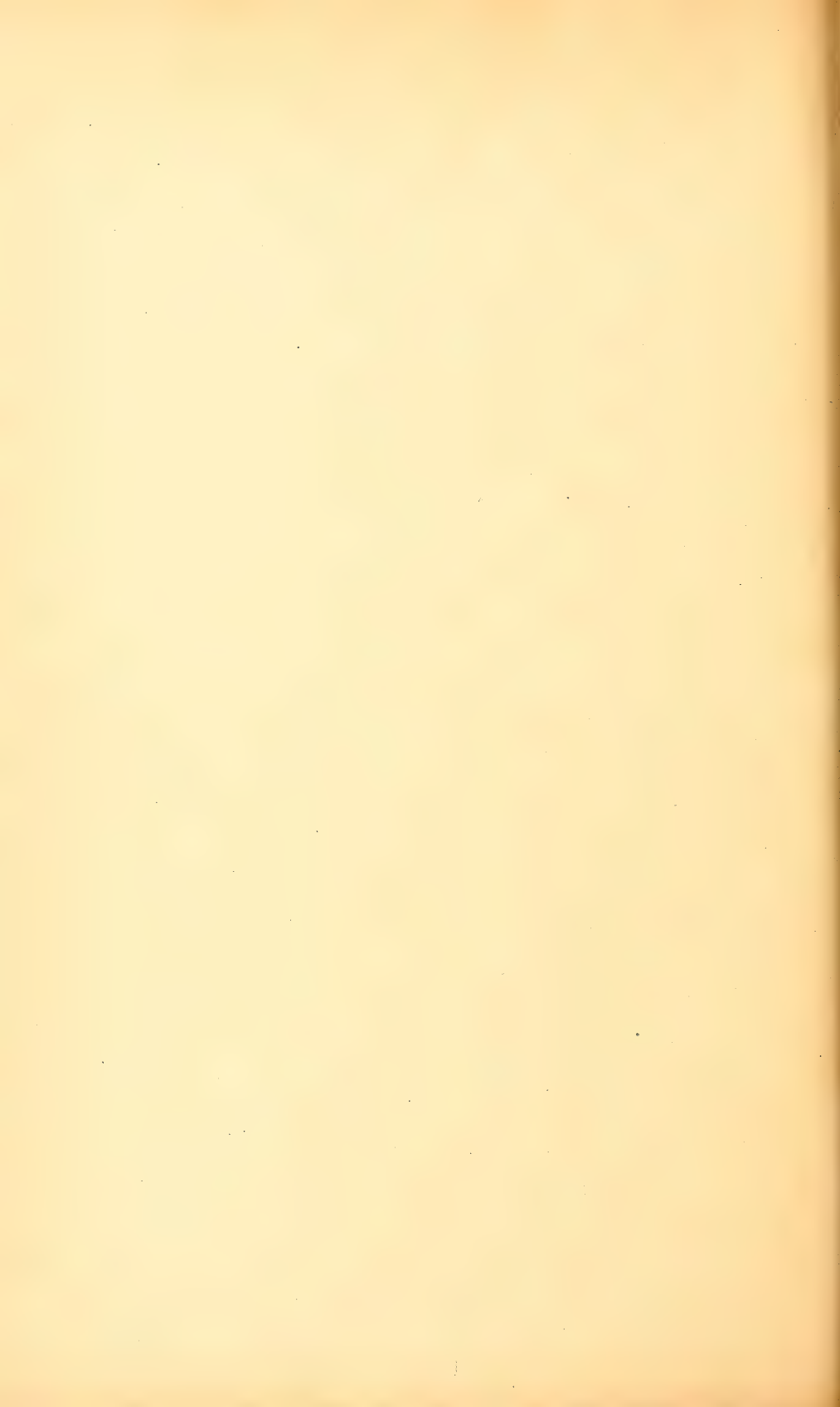
It is conceded by appellant, Karr, and his counsel that the note and mortgage in question are forgeries, and not a lien on said premises. He therefore had no lien



on said premises to protect. Appellee had placed in the hands of Renshaw sufficient funds, together with her receipt, with which to pay off said mortgage. The fact that Renshaw may not have applied the funds that appellee gave him in the first instance to pay off said mortgage, but afterwards procured funds with which to pay the same, would not render appellee liable to the person from whom he had procured such funds by the sale of a forged note and mortgage.

With reference to the claim of said executor that he should be given a prior lien on said premises on the ground that Renshaw was representing appellee as her agent, it should further be observed that there can be no agency for the purpose of committing a forgery or other criminal act. *Pierce v. Foot*, 113 Ill., 228-238; *Jamieson v. Wallace*, 167 Ill., 388-399. And before a party can be held to have ratified a forged instrument, it must be shown that he did so with full knowledge of all the material facts. It will never be implied from a doubtful state of facts. *Chicago Edison Co. v. Fay*, 164 Ill., 303. There is no evidence of any character tending to show that appellee in any way ratified the acts of Renshaw in connection with said forgeries, after having learned of the same.

It is also contended by appellant Karr that appellee Lena Edinger, who purchased the note and mortgage of \$6,000 executed by appellee and her husband, was not a bona fide holder thereof, except to the extent of \$1,500, and that she is only entitled to a lien for said amount; it being the contention of appellant Karr that there is nothing to show that she paid anything, in fact, in addition therefor. The record clearly discloses that Mrs. Edinger gave Renshaw a check for \$1,500, and that the same was paid, and that at the same time she delivered to him two mortgages aggregating \$4,500. Renshaw



and Mrs. Edinger testified to that effect, and there is no sufficient evidence in the record to the contrary.

For the reasons above set forth, the judgment and decree of the trial court will be affirmed.

Judgment affirmed.

Not to be reported.



Term No. 3.

Agenda No. 2

IN THE

Appellate Court of Illinois

FOURTH DISTRICT.

MARCH TERM, A. D. 1926.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

MED LEDFORD,

Plaintiff in Error.

*Error to the County
Court of Saline Co.*

Barry, J.—Upon being found guilty of a violation of the Prohibition Act, plaintiff in error moved the court, orally, to set aside the verdict and for a new trial. The record discloses that on the argument thereof his attorney informed the court that the only ground relied upon was that the evidence was not sufficient to support the verdict. That being true all other alleged errors, now urged upon our attention, were waived and cannot be considered, *Shoaff v. Funk*, 182 Ill., 224. The fact that plaintiff in error is not now represented by the attorney who tried the case in the county court, does not authorize us to pass upon matters which were withdrawn from the consideration of that court.

The court will only reverse a conviction on the evidence when it is able to say, from a consideration of the whole testimony, that there is clearly a reasonable and well-founded doubt of the guilt of the accused, *People v. Greenberg*, 302 Ill., 566; *People v. Goldman*, 318 Ill., 77. We have carefully considered the evidence and it is our opinion that we would not be warranted in holding that it is insufficient to support the verdict. The judgment is affirmed.

Affirmed.

Not to be reported.

241 I.A. 644

Term No. 45.

Agenda No. 54.

IN THE

Appellate Court of Illinois

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1925.

WENDEL PAGE,

vs.

FRANK BLAIR,

Appellant,

Appellee.

*Appeal from Marion
Circuit Court.*

Barry J., Appellant, a child under seven years of age, was struck and injured by a truck driven by appellee. Issues were joined upon a declaration charging appellee with negligence in the operation of the truck and there was a verdict of not guilty. The court overruled the motion for a new trial and entered judgment on the verdict.

It is insisted, that, in the examination of two of the jurors on their voir dire, the court erred in sustaining objections to the questions:—"Have you any interest in the Auto Owners' Protective Exchange?" "I will ask you, Mr. Cooper, if you are interested in any way in the Auto Owners' Protective Exchange?" The record shows that Mr. Cooper did not serve as a juror in the trial of the case, and the bill of exceptions does not disclose the name of the other juror who was interrogated. In an affidavit filed in support of the motion for a new trial it is stated that the questions aforesaid were asked the juror Griffin who was accepted and participated in the trial of the case. Matters occurring in the presence of the court, during a trial, should be preserved in the bill of exceptions and cannot be made to appear by ex parte affidavits presented on a motion for a new trial. *Kelly v. C. R. I. & P. Ry. Co.*, 175 App. 196; *People v. Strauch*,



247 Ill., 220-228. It does not appear that appellant exercised any of his peremptory challenges. A party cannot complain concerning the selection of a jury when his peremptory challenges are not exhausted, and he voluntarily accepted all the jurors. *Kelly v. C. R. I. & P. Ry. Co.*, *supra*; *People v. Gray*, 251 Ill., 431.

It is argued that the court erred in its rulings on the admission and exclusion of evidence, but we are of the opinion that no reversible error was committed in that regard. In the state of the proof we would not be warranted in setting aside the verdict on the ground that it is manifestly against the weight of the evidence. It is contended that the court erred in giving instructions on behalf of appellee. None were asked by appellant and a careful consideration of those given at the request of appellee leads to the conclusion that the jury was fully and fairly instructed as to the law applicable to the case. The affidavits filed in support of the motion for a new trial are wholly insufficient to warrant a reversal. No reversible error having been pointed out, the judgment is affirmed.

Affirmed.

Not to be reported.

III. Unpublished opinions

241

75587

Borrower who signs this card is responsible for the return of the book.

Not Transferable.

Not to be taken from the Reading Room.

Sign legibly.

Obey these rules and avoid fines.

Date _____

Name

3/5/64
J. O'More
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